No. 97-1374-ATX Title: William J. Clinton, President of the United States, et al., Appellants
v.
City of New York, et al.

Docketed:
February 20, 1998 Court: United States District Court for the District of Columbia

Entry	Date	Proceedings and Orders
	Feb 20 1998	Statement as to jurisdiction filed. (Response due March 22, 1998)
	Feb 20 1998	Motion of the parties to expedite consideration and to expedite briefing schedule filed.
	Feb 24 1998	Memorandum of appellees Snake River Potato Growers, Inc., et al. filed.
	Feb 24 1998	Brief of appellees City of New York, et al. in opposition filed.
	Feb 27 1998	Motion of the parties to expedite consideration and to expedite briefing schedule GRANTED.
	Feb 27 1998	PROBABLE JURISDICTION NOTED. The brief of the Solicitor General is to be filed with the Clerk and served upon opposing counsel on or before 3 p.m., Friday, March 13, 1998. The briefs of appellees are to be filed with the Clerk and served upon opposing counsel on or before 3 p.m., Friday, April 3, 1998. A reply brief, if any, is to be filed with the Clerk and served upon opposing counsel on or before 3 p.m., Monday, April 13, 1998. Rule 29.2 does not apply. Oral argument is set for Monday, April 27, 1998. SET FOR ARGUMENT April 27, 1998. **********
	Mar 13 1998	Brief of appellants William J. Clinton, et al. filed.
	Mar 13 1998	Brief amici curiae of Dan Burton, Gerald Solomon and Porter Goss filed.
	Mar 13 1998	Brief amicus curiae of United States Senate filed.
	Mar 13 1998	Joint appendix filed.
	Mar 13 1998	Letter from counsel for Bipartisan Legal Advisory Group of the United States House of Representatives received.
	Mar 19 1998	Motion of appellees for divided argument filed.
	Mar 31 1998	Record filed.
	Apr 1 1998	CIRCULATED.
	Apr 2 1998	Brief amici curiae of Marci Hamilton and David Schoenbrod filed.
	Apr 3 1998	Brief of appellees Snake River Potato Growers and Mike Cranney in opposition filed.
	Apr 3 1998	Brief of appellees City of New York, et al. filed.
	Apr 3 1998	Brief amicus curiae of Association of the Bar of the City of New York filed.
	Apr 3 1998	Brief amici curiae of Senators Robert C. Byrd, Daniel Moynihan and Carl Levin filed.
	Apr 3 1998	Brief amici curiae of Henry Waxman, David Skaggs and Louise Slaughter filed.
	Apr 6 1998	Motion of appellees for divided argument GRANTED. to be divided as follows: appellants 30 minutes; New York City

2pp

No. 97-1374-ATX

Entry	Date	Proceedings and Orders
		appellees - 15 minutes; Snake River appellees - 15 minutes. The request for additional time for oral argument is denied.
	Apr 7 1998	Motion of John S. Baker, Jr. for leave to file a brief as amicus curiae filed.
	Apr 13 1998	Reply brief of appellants William J. Clinton, et al. filed.
	Apr 20 1998	Motion of John S. Baker, Jr. for leave to file a brief as amicus curiae GRANTED.
	Apr 21 1998	Supplemental brief of appellees City of New York, et al. filed.
	Apr 27 1998	ARGUED.
	Apr 29 1998	Letter from counsel for the respondents Snake River Potato Growers, et al.received and distributed.

Supreme Court, U.S.
FILED

971374 FEB 20 1998

OFFICE OF THE CLERK

No.

In the Supreme Court of the United States

OCTOBER TERM, 1997

WILLIAM J. CLINTON, ET AL., APPELLANTS

v.

CITY OF NEW YORK, ET AL.

ROBERT E. RUBIN, APPELLANT

v.

SNAKE RIVER POTATO GROWERS, INC., ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

JURISDICTIONAL STATEMENT

SETH P. WAXMAN
Solicitor General
FRANK W. HUNGER
Assistant Attorney General
EDWIN S. KNEEDLER
Deputy Solicitor General
MALCOLM L. STEWART
Assistant to the Solicitor General
DOUGLAS N. LETTER
SCOTT R. MCINTOSH
Attorneys
Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

QUESTIONS PRESENTED

The Line Item Veto Act, 2 U.S.C. 691 *et seq.*, gives the President conditional authority to cancel certain spending and revenue items within five days after a bill containing such items has been enacted into law. The questions presented are as follows:

1. Whether the appellees in this case have standing to challenge the constitutionality of the Act.

2. Whether the Act violates Article I of the Constitution or principles of separation of powers.

PARTIES TO THE PROCEEDINGS

The appellants here, who were the defendants in the district court, are William J. Clinton, the President of the United States; Donna E. Shalala, the Secretary of Health and Human Services; Franklin D. Raines, the Director of the Office of Management and Budget; and Robert E. Rubin, the Secretary of the Treasury. The appellees here, who were the plaintiffs below, are the City of New York; the New York City Health and Hospitals Corporation; the Greater New York Hospital Association; the Jamaica Hospital Medical Center; District Council 37, American Federation of State, County, and Municipal Employees; Local 1199, National Health and Human Service Employees Union; Snake River Potato Growers, Inc.; and Mike Cranney.

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JURISDICTIONAL STATEMENT

OPINION BELOW

The opinion of the district court (App., *infra*, 1a-33a) is not yet reported.

JURISDICTION

The order of the district court was entered on February 12, 1998. A notice of appeal (App., *infra*, 34a-35a) was filed on February 13, 1998. The jurisdiction of this Court is invoked under 2 U.S.C. 692(b) (Supp. II 1996).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. The Presentment Clause of the United States Constitution, Art. I, § 7, Cl. 2, provides as follows:

> Every Bill which shall have passed the House of Representatives and the Senate, shall, before it become a Law, be presented to the President of the United States; If he approve he shall sign it, but if not he shall return it, with his Objections to that House in which it shall have originated, who shall enter the Objections at large on their Journal, and proceed to reconsider it. If after such Reconsideration two thirds of that House shall agree to pass the Bill, it shall be sent, together with the Objections, to the other House, by which it shall likewise be reconsidered, and if approved by two thirds of that House, it shall become a Law. But in all such Cases the Votes of both Houses shall be determined by yeas and Nays, and the Names of the Persons voting for and against the Bill shall be entered on the Journal of each House respectively. If any Bill shall not be returned by the President within ten Days (Sundays excepted) after it shall have been presented to him, the Same shall be a Law, in like Manner as if he had signed it, unless the Congress by their Adjournment prevent its Return, in which Case it shall not be a Law.

2. The Line Item Veto Act, 2 U.S.C. 691 *et seq.* (Supp. II 1996), is reproduced at App., *infra*, 36a-60a.

3. Section 4722(c) of the Balanced Budget Act of 1997, Pub. L. No. 105-33, 111 Stat. 515, is reproduced at App., *infra*, 72a.

4. Section 968 of the Taxpayer Relief Act of 1997, Pub. L. No. 105-34, 111 Stat. 895-896, is reproduced at App., *infra*, 72a-74a.

STATEMENT

This case involves a challenge to the constitutionality of the Line Item Veto Act. In the proceedings below, the District Court for the District of Columbia ruled that the Act violates Article I of the Constitution and principles of separation of powers. Congress has vested this Court with direct appellate jurisdiction over the district court's decision. 2 U.S.C. 692(b) (Supp. II 1996).

1. The Line Item Veto Act gives the President conditional authority to cancel certain spending and revenue items within five days after a bill containing such items has been enacted into law. The Act is the latest in a series of statutes, dating from 1789 to the present, in which Congress has given the Executive Branch discretion over the expenditure of appropriated funds.

a. The first statute appropriating funds for the general operation of the federal government was passed by the First Congress and signed by President Washington in September 1789. See Act of Sept. 29, 1789, ch. 23, § 1, 1 Stat. 95. The statute appropriated "sum[s] not exceeding" specified amounts for the expenses of the War Department, government salaries, military pensions, and outstanding debt. *Ibid.* The First Congress subsequently enacted two additional general appropriations statutes, which likewise appropriated "sum[s] not exceeding" specified amounts for the government's operations. Act of Mar. 26, 1790, ch. 4, § 1, 1 Stat. 104; Act of Feb. 11, 1791, ch. 6, § 1, 1 Stat. 190. See Ralph S. Abascal & John R. Kramer, *Presidential Impoundment Part I: Historical Genesis and Constitutional Framework*, 62 Geo. L. J. 1549, 1579 (1974).

The appropriations acts of the First Congress gave the President two distinct kinds of discretion over appropriated funds, both of which have become familiar elements of the federal budget process. First, by appropriating sums "not exceeding" specified amounts, Congress gave the President discretion not to obligate the full amount of the appropriations. It has since become a commonplace of federal appropriations law that an appropriation "not exceeding" a specified sum leaves the Executive Branch with discretion to spend less than the full amount of the appropriation, absent some other statutory restriction on that discretion. See, *e.g.*, H.R. Rep. No. 1797, 81st Cong., 2d Sess. 9 (1950) ("Appropriation of a given amount for a particular activity constitutes only a ceiling upon the amount which should be expended for that activity."); 89 Cong. Rec. 10,362 (1943) (Sen. Truman) ("When the Congress appropriates funds * * * none of us hold[s] that we give a mandate to expend the funds appropriated.").

Second, the appropriations acts of the First Congress provided Executive Branch departments with what are now known as "lump-sum" appropriations—that is, appropriations for the operation of a department that do not specify the particular items for which the funds are to be used. For example, the first appropriations act appropriated "a sum not exceeding one hundred and thirty-seven thousand dollars for defraying the expenses of the department of war." Act of Sept. 29, 1789, ch. 23, § 1, 1 Stat. 95. The Act did not prescribe any particular expenditures to be made by the President from that appropriation. As a result, the President was given discretion not only with respect to the amount of the appropriated sum that would be used, but also with respect to its allocation

within the Department of War. This Court recently reaffirmed that, "where Congress merely appropriates lump-sum amounts without statutorily restricting what can be done with those funds, a clear inference arises that [Congress] does not intend to impose legally binding restrictions" on the allocation of the funds among authorized purposes. *Lincoln* v. *Vigil*, 508 U.S. 182, 192 (1993) (internal quotation marks omitted). The use of lump sum appropriations has since become a common mechanism in circumstances where Executive Branch discretion and flexibility are viewed as desirable, especially during periods of economic and military crisis. See, *e.g.*, Louis Fisher, *Presidential Spending Discretion and Congressional Controls*, 37 Law & Contemp. Probs. 135, 136 (1972).

Early in the Twentieth Century, Congress began to enact laws that gave the Executive Branch standing authority to control spending on a government-wide basis. In 1905 and 1906, Congress amended the Antideficiency Act (Act of July 12, 1870, ch. 251, § 7, 16 Stat. 251) to give agencies authority to apportion appropriations over the course of a fiscal year, while authorizing them to modify or waive apportionments in exigent circumstances. Act of Mar. 3, 1905, ch. 1484, § 4, 33 Stat. 1257-1258; Act of Feb. 27, 1906, ch. 510, § 3, 34 Stat. 48-49.

In 1933, in response to the fiscal pressures created by the Great Depression, Congress granted the President broad discretion to refrain from spending appropriated funds. See Act of Mar. 3, 1933, ch. 212, § 16, 47 Stat. 1517-1519 (amending Act of June 30, 1932, ch. 314, §§ 401-408, 47 Stat. 413-415)); see also Act of Mar. 4, 1933, ch. 281, § 4, 47 Stat. 1602. In 1950, Congress amended the Antideficiency Act to provide

the Executive Branch with general authority to establish "reserves"—that is, to withhold appropriated funds—in order "to provide for contingencies, or to effect savings whenever savings are made possible by or through changes in requirements, greater efficiency of operations, or other [post-appropriation] developments." General Appropriation Act, 1951, ch. 896, § 1211, 64 Stat. 765-766. Congress directed the Executive Branch to "recommend the rescission" of any reserves "not * * * required to carry out the purposes of the appropriation concerned." *Id.* at 766. More recently, during the Vietnam War, Congress gave the President still greater discretionary authority over expenditures of appropriated funds. See Abascal & Kramer, *supra*, 62 Geo. L.J. at 1569 & n.90; Fisher, *supra*, 37 Law & Contemp. Probs. at 160-161.

b. In each of the foregoing instances, the Executive Branch was authorized by statute to withhold appropriated sums. During the early 1970s, however, President Nixon asserted a general authority to impound appropriated funds whether or not Congress intended for the impounded appropriations to be discretionary. See, *e.g.*, 9 Weekly Comp. Pres. Doc. 110 (1973). The Nixon Administration's effort to impound appropriations for a wide range of federal programs led to a series of lawsuits challenging individual impoundments. See, *e.g.*, *City of New Haven* v. *United States*, 634 F. Supp. 1449, 1454-1455 & n.6 (D.D.C. 1986) (summarizing cases), aff'd, 809 F.2d 900 (D.C. Cir. 1987); Ralph S. Abascal & John R. Kramer, *Presidential Impoundment Part II: Judicial and Legislative Responses*, 63 Geo. L.J. 149, 151-168 (1974); Nile Stanton, *History and Practice of Executive Impoundment of Appropriated Funds*, 53 Neb. L. Rev. 1, 14-30 (1974).

In response to the impoundment controversy, Congress enacted the Impoundment Control Act of 1974 (ICA), Pub. L. No. 93-344, Tit. X, 88 Stat. 332 (codified as amended at 2 U.S.C. 681 *et seq.*). The ICA distinguished between two forms of impoundment: deferrals (delays in spending during the course of a fiscal year, or other period of availability) and rescissions (permanent withholdings of appropriated funds). See 2 U.S.C. 682(1), 682(3). The ICA authorized the President to carry out deferrals, subject to a one-House legislative veto. 2 U.S.C. 684 (1982).[1] However, the ICA prohibited the President from engaging in unilateral rescissions. Instead, it authorized the President to propose rescissions to Congress under a mechanism for expedited legislative consideration. 2 U.S.C. 683 (1982). In addition, the ICA amended the Antideficiency Act to narrow the circumstances in which the Executive Branch could place appropriated funds in reserves. See ICA § 1002, 88 Stat. 332.

2. The Line Item Veto Act was enacted in April 1996 as an amendment to the ICA. See Pub. L. No. 104-130, 110 Stat. 1200, 2 U.S.C. 691 *et seq.* (Supp. II 1996) (App., *infra*, 36a-60a). The Act expires on January 1, 2005. 2 U.S.C. 691 note (Supp. II 1996). It authorizes the President to "cancel in whole" specific spending and revenue items contained in any bill or joint resolution "that has been signed into law

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[1] This Court's decision in *INS* v. *Chadha*, 462 U.S. 919 (1983), made clear that the ICA's legislative veto provision was unconstitutional. See *City of New Haven* v. *United States*, 809 F.2d 900, 905 (D.C. Cir. 1987) (government conceded unconstitutionality of legislative veto provision). Congress subsequently amended the ICA to eliminate that provision. Act of Sept. 29, 1987, Pub. L. No. 100-119, § 206(a), 101 Stat. 785-786.

pursuant to Article I, section 7, of the Constitution of the United States." 2 U.S.C. 691(a) (Supp. II 1996).

The President's cancellation authority extends to three categories of budget items: (1) "dollar amount[s] of discretionary budget authority," (2) "item[s] of new direct spending," and (3) "limited tax benefit[s]." 2 U.S.C. 691(a) (Supp. II 1996). A "dollar amount of discretionary budget authority" is "the entire dollar amount of budget authority" that is specified in an appropriations law or is otherwise specified, represented, or required to be spent. 2 U.S.C. 691e(7)(A) (Supp. II 1996). An "item of new direct spending" is a specific provision that will result in "an increase in budget authority or outlays" for entitlements, food stamps, or other programs funded other than through annual appropriations. 2 U.S.C. 691e(8) (Supp. II 1996).[2] A "limited tax benefit" is a revenue-losing provision that affords a tax reduction to 100 or fewer beneficiaries, or a provision that affords "temporary or permanent

[2] The Act defines the term "direct spending" to include "(A) budget authority provided by law (other than an appropriation law); (B) entitlement authority; and (C) the food stamp program." 2 U.S.C. 691e(5) (Supp. II 1996). An "item of new direct spending" is a provision of law estimated to result in direct spending in excess of the "baseline" levels calculated pursuant to Section 257 of the Balanced Budget and Emergency Deficit Control Act of 1985, 2 U.S.C. 907. See 2 U.S.C. 691e(8) (Supp. II 1996); see also H.R. Conf. Rep. No. 491, 104th Cong., 2d Sess. 36 (1996). An increase in outlays for such entitlements resulting from automatic cost-of-living or comparable adjustments under *existing* law is in the "baseline" and therefore is not an item of "new" direct spending under the Line Item Veto Act.

transitional relief" to ten or fewer beneficiaries. 2 U.S.C. 691e(9) (A) (Supp. II 1996).[3]

Cancellation of a dollar amount of discretionary budget authority operates "to rescind" that authority. 2 U.S.C. 691e(4)(A) (Supp. II 1996). Cancellation of an item of new direct spending or a limited tax benefit renders the cancelled spending or revenue provision without "legal force or effect." 2 U.S.C. 691e(4)(B) and (C) (Supp. II 1996). The President may not use funds covered by a cancellation for any purpose other than deficit reduction. 2 U.S.C. 691b(b), 691c (Supp. II 1996). Deficit reduction is accomplished through a statutory "lockbox" procedure, under which the Director of the Office of Management and Budget (OMB) must estimate the deficit reduction from the cancellation and "lock in" the savings by adjusting the calculations submitted to Congress under the Gramm-Rudman-Hollings Act. 2 U.S.C. 691c(a) and (b) (Supp. II 1996).

If the President wishes to exercise his cancellation authority, he must submit a special message to Congress within five calendar days (excluding Sundays) after the enactment of the law containing the cancelled item. 2 U.S.C. 691(a)(B), 691a(c)(1) (Supp. II 1996). The President may cancel an item only if he determines that doing so will "(i) reduce the Federal budget deficit; (ii) not impair any essential Government functions; and (iii) not harm the national

[3] The Act provides for the Joint Committee on Taxation to identify limited tax benefits in future revenue bills. 2 U.S.C. 691f(a) (Supp. II 1996). If Congress incorporates the Joint Committee's statement into a revenue law as finally enacted, the President's authority to cancel limited tax benefits is confined to the items, if any, identified in that law. 2 U.S.C. 691f(b) and (c) (Supp. II 1996).

interest." 2 U.S.C. 691(a)(A) (Supp. II 1996). The President must also consider "the legislative history, construction, and purposes of the law" containing the items, as well as "any specific sources of information referenced in such law." 2 U.S.C. 691(b)(1) and (2) (Supp. II 1996). In addition, the President's special message to Congress must identify, *inter alia*, the reasons for the cancellation; the President's estimate of the "fiscal, economic, and budgetary effect" of the cancellation; his estimate of "the * * * effect of the cancellation upon the objects, purposes and programs for which the canceled authority was provided"; and the geographic distribution of the cancelled spending. 2 U.S.C. 691a(b) (Supp. II 1996).

A cancellation takes effect upon Congress's receipt of the President's special message. 2 U.S.C. 691b(a) (Supp. II 1996). The Act provides for highly expedited consideration by Congress of "disapproval bills." 2 U.S.C. 691d, 691e(6) (Supp. II 1996). If a disapproval bill is enacted into law, all disapproved cancellations become null and void and the cancelled items become effective. 2 U.S.C. 691b(a) (Supp. II 1996). A disapproval bill is not subject to the President's cancellation authority under the Act. 2 U.S.C. 691(c) (Supp. II 1996).

Although the Line Item Veto Act establishes general rules for the execution of appropriations laws, nothing in the Act purports to prevent Congress from exempting any subsequent spending or revenue bill (or portion thereof) from the operation of the Act by including a provision to that effect in the bill itself. This Court has recognized that Congress may "exempt a given appropriations bill (or a given provision in an appropriations bill) from the Act." *Raines* v. *Byrd*, 117 S. Ct. 2312, 2320 (1997).

3. The Line Item Veto Act took effect on January 1, 1997. See 2 U.S.C. 691 note (Supp. II 1996). Immediately thereafter, several Members of Congress filed an action for declaratory relief, contending that the Act violates Article I of the Constitution and principles of separation of powers. The suit was filed under the Act's judicial review provision, which states that "[a]ny Member of Congress or any individual adversely affected" by the Act "may bring an action, in the United States District Court for the District of Columbia, for declaratory judgment and injunctive relief on the ground that any provision of [the Act] violates the Constitution." 2 U.S.C. 692(a)(1) (Supp. II 1996).[4]

The district court entered judgment in favor of the plaintiffs, holding that they had standing and that the Act is unconstitutional. *Byrd* v. *Raines*, 956 F. Supp. 25 (D.D.C. 1997). The government appealed to this Court pursuant to 2 U.S.C. 692(b) (Supp. II 1996), which provides that orders issued in actions challenging the constitutionality of the Act "shall be reviewable by appeal directly to the Supreme Court." After noting probable jurisdiction (117 S. Ct. 1489 (1997)), this Court vacated the judgment of the district court without reaching the merits, holding that the plaintiff Members of Congress lacked standing under Article III of the Constitution to challenge the constitutionality of the Act. 117 S. Ct. 2312 (1997).

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[4] A similar constitutional challenge was brought by a federal labor union immediately after the Act was signed into law in April 1996. That action was dismissed on standing and ripeness grounds. See *National Treasury Employees Union* v. *United States*, 101 F.3d 1423 (D.C. Cir. 1996).

4. At the time of this Court's decision in *Raines* v. *Byrd*, the President had not yet canceled any spending or revenue item pursuant to the Act. Since then, the President has exercised his cancellation authority on several occasions. The present litigation arises out of two specific cancellations.

a. The first cancellation involves a spending provision that granted the State of New York preferential treatment regarding federal payments under the Medicaid program. States that participate in the Medicaid program receive matching funds from the federal government, which are based on a State's allowable medical assistance expenditures. See generally 42 U.S.C. 1396b(a). The amount of a State's allowable medical assistance expenditures is reduced by the revenue that the State receives from health care related taxes unless, *inter alia*, the taxes are "broad based." 42 U.S.C. 1396b(w)(1)(A)(ii). If a particular health care related tax does not satisfy the statutory criteria for "broad based" taxes (see 42 U.S.C. 1396b w(3)(B)), the State may apply to the Secretary of Health and Human Services for a waiver, pursuant to which the Secretary will "treat [the] tax as * * * broad based" if it satisfies other criteria. 42 U.S.C. 1396b(w)(3)(E). The waiver application is reviewed by the Health Care Financing Administration (HCFA) in the Department of Health and Human Services, and HCFA's determination is subject to review by the Departmental Appeals Board. App., *infra*, 7a.

In 1994, HCFA notified the State of New York that certain health care related taxes levied by the State are not "broad based" and therefore must be taken into account in calculating the State's federal Medicaid payment. See App., *infra*, 7a. The State subsequently filed over 60 applications for waivers.

Ibid. As of this date, no formal action has been taken by HCFA on any of New York's pending waiver applications. *Ibid.* While the applications remain pending, the state taxes at issue are disregarded in determining New York's allowable medical assistance expenditures. See Brown Decl. ¶ 7. As a result, no reduction in federal Medicaid payments to New York has yet taken place. *Ibid.*

On August 5, 1997, the Balanced Budget Act of 1997 was enacted into law. Pub. L. No. 105-33, 111 Stat. 251. Section 4722(c) of the Balanced Budget Act provided that health care related taxes collected by New York before June 1, 1997, for which waiver applications were still pending, "are deemed to be permissible health care related taxes and in compliance with the requirements" for broad based taxes under the Medicaid program. 111 Stat. 515; App., *infra*, 72a. On August 11, 1997, the President transmitted to Congress a special message (see pp. 9-10, *supra*) canceling Section 4722(c) as an "item of new direct spending" under the Act. 62 Fed. Reg. 43,262; App, *infra*, 61a-65a.

b. The second cancellation at issue here involves a tax provision that would have given special treatment to a small class of agricultural stock sales. As a general matter, Section 1042 of the Internal Revenue Code permits taxpayers to defer recognition of capital gains from the sale of certain stock to employee stock ownership plans (ESOPs) or eligible worker-owned cooperatives. 26 U.S.C. 1042. The capital gains are not recognized until the taxpayer sells the replacement property purchased with the proceeds of the original sale. Section 1042 thus defers, but generally does not eliminate, the capital gains tax on such transactions. Because the capital gain accrues to the

seller, Section 1042 affects the tax liability of the seller rather than that of the purchaser.

On August 5, 1997, the Taxpayer Relief Act of 1997 was enacted into law. Pub. L. No. 105-34, 111 Stat. 788. Section 968 of the Taxpayer Relief Act extended Section 1042 to cover taxpayers who sell, after December 31, 1997, stock of domestic corporations that are qualified refiners or processors of agricultural or horticultural products to an eligible farmers' cooperative. 111 Stat. 895-896; App., *infra*, 72a-74a. The Taxpayer Relief Act specifically identified Section 968, along with certain other provisions, as "limited tax benefits" for purposes of the Line Item Veto Act. See 111 Stat. 1101. On August 11, 1997, the President transmitted to Congress a special message canceling Section 968 and another provision of the Taxpayer Relief Act. 62 Fed. Reg. 43,265; App., *infra*, 66a-67a, 70a-71a.

c. In October 1997, two suits challenging the constitutionality of the Act were filed in the District Court for the District of Columbia. The first suit, *City of New York* v. *Clinton*, Civ. No. 97-2393 (D.D.C.), challenged the President's cancellation of Section 4722(c) of the Balanced Budget Act of 1997. Although Section 4722(c) concerned federal payments to the State of New York, the State itself is not a party to the suit. Instead, the suit was filed by the City of New York, the New York City Health and Hospitals Corporation, the Greater New York Hospital Association, a local hospital, and two local unions.

The plaintiffs in *City of New York* (appellees in this Court) asserted that the appellee health care providers will be required to pay additional state taxes and assessments if New York's pending waiver

applications are ultimately denied. Complaint ¶ 25. Appellees asserted that the President's cancellation of Section 4722(c) "reinstate[d]" the appellee providers' potential "exposure" to those tax obligations and "burden[ed]" their ability to engage in financial planning and borrowing. Complaint ¶¶ 26-27.

The second suit, *Snake River Potato Growers, Inc.* v. *Rubin*, Civ. No. 97-2463 (D.D.C.), challenged the President's cancellation of Section 968 of the Taxpayer Relief Act of 1997. The plaintiffs in *Snake River* (appellees in this Court) are an Idaho farmers' cooperative and a potato grower who is a member, director, and vice-chairman of the cooperative. Appellees alleged that the cooperative is an "eligible farmers' cooperative" within the meaning of Section 968. Complaint ¶ 7.

The *Snake River* appellees did not assert that the President's cancellation of Section 968 had affected or could affect their own tax liability. Instead, they alleged that the cancellation of Section 968 would make it more difficult, and "generally" more expensive, for the cooperative to purchase the facilities of agricultural processors that are supplied by the cooperative's members. Complaint ¶ 15. Appellees asserted that if Section 968 had not been canceled, it would have allowed a processor to sell its facilities to the cooperative while deferring recognition of any capital gain, which "would have allowed Snake River to offer and would have encouraged a processor to accept a lower price for those facilities." *Ibid.* Appellees also alleged that the cancellation of Section 968 had interfered with one potential transaction that had been under negotiation in expectation of Section 968's enactment. *Id.* ¶ 16.

d. The district court consolidated the *City of New York* and *Snake River* suits into a single proceeding.[5] The government filed a motion to dismiss, contending that the plaintiffs in both cases lack standing under Article III of the Constitution and that their claims are not ripe. While the motion to dismiss was pending, the parties filed cross-motions for summary judgment on the merits. The motions were filed and argued under an expedited schedule, in accordance with 2 U.S.C. 692(c) (Supp. II 1996), which directs the district court and this Court "to advance on the docket and to expedite to the greatest possible extent the disposition of" any suit challenging the constitutionality of the Act.

On February 12, 1998, the district court denied the motion to dismiss and granted summary judgment to appellees in both suits. App., *infra*, 1a-33a. The court first determined that the appellees have standing under Article III. *Id.* at 11a-21a. In *City of New York*, the court reasoned that Section 4722(c) provided a benefit to the appellee health care providers by protecting them from "any [state tax] liability that otherwise might befall them," and that "the President took that benefit away" when he canceled Section 4722(c) of the Balanced Budget Act of 1997. *Id.* at 13a. The court dismissed as irrelevant the fact that New York has applied for administrative waivers and that the providers will not face new state tax liabilities unless the waivers are denied. *Id.* at 13a-14a. The

[5] A third suit challenging the constitutionality of the Act, *NTEU* v. *United States*, Civ. No. 97-2399 (D.D.C.), was also made a part of the consolidated proceeding. However, *NTEU* was subsequently resolved on non-constitutional grounds, and it is not a part of this appeal.

court regarded it as "more likely than not" that New York will be required to refund at least some of its federal Medicaid payment at the conclusion of the administrative process, and deemed it "highly likely" that the providers will be required to indemnify New York for any such repayments. *Id.* at 15a.

In *Snake River*, the court concluded that the President's cancellation of Section 968 of the Taxpayer Relief Act of 1997 caused the appellees "an immediate, concrete injury" because it prevented them from competing "on equal footing" with investor-owned businesses, which are able to structure the acquisition of agricultural processing facilities to give the sellers the tax benefits conferred by Section 1042 of the Internal Revenue Code. App., *infra*, 15a-16a. The court construed this Court's decision in *Northeastern Florida Chapter of Associated General Contractors of America* v. *City of Jacksonville*, 508 U.S. 656 (1993), to hold that "the inability to compete on an equal basis in the bidding process is injury in fact." App., *infra*, 16a. The court also found it "likely" that the appellees would have benefited "in a concrete way" from the ability of sellers of agricultural processing facilities to defer capital gains under Section 968. *Id.* at 17a. Although Section 968 governed the tax liability of sellers, rather than that of purchasers, the court concluded that Section 968 would have "allow[ed] [appellees] to pay a lower purchase price" or, "at the very least," would have "give[n] [appellees] some room to negotiate in terms of price." *Id.* at 17a-18a.

On the merits, the district court held that the Line Item Veto Act violates the Presentment Clause of Article I and principles of separation of powers. App., *infra*, 22a-33a. The court acknowledged that "the

initial passage of the Balanced Budget Act and the Taxpayer Relief Act complied with the" requirements of Article I. *Id.* at 24a. The court held, however, that the President's cancellation of individual items contained within those laws was constitutionally infirm because "[t]he laws that resulted after the President's line item veto were different from those consented to by both Houses of Congress." *Ibid.* The court concluded that "[b]ecause the Line Item Veto Act produced laws in violation of the requirements of bicameral passage, because it permitted the President unilaterally to repeal or amend duly enacted laws, and because it impermissibly attempts to evade the requirement that the President sign or reject a bill *in toto*, the Act violates the requirements of Article I." *Id.* at 27a. The court also held that the Act offends separation of powers principles, because it authorizes the President to perform "an inherently legislative function, namely, the authority to permanently shape laws and package legislation." *Id.* at 29a.

THE QUESTIONS PRESENTED ARE SUBSTANTIAL

The Line Item Veto Act vests this Court with appellate jurisdiction over district court decisions regarding the constitutionality of the Act. 2 U.S.C. 692(b). This case falls squarely within this Court's appellate jurisdiction under the Act. The district court erred both in holding that the appellees have standing under Article III to challenge the constitutionality of the Line Item Veto Act and in holding that the Act is unconstitutional.

1. The threshold question is whether the appellees satisfy the standing requirements of Article III. This Court has recognized that "when the plaintiff is not himself the object of the government action or

inaction he challenges, standing is not precluded, but it is ordinarily 'substantially more difficult' to establish." *Lujan* v. *Defenders of Wildlife*, 504 U.S. 555, 562 (1992) (quoting *Allen* v. *Wright*, 468 U.S. 737, 758 (1984)). The potential direct beneficiaries of the tax and spending items whose cancellation is at issue here have declined to file suit to challenge the cancellations. The appellees in both suits assert a purely derivative interest in the outcome of the litigation, an interest that in our view does not satisfy the requirements of Article III.

a. The injury alleged in *Snake River* is particularly speculative. The district court acknowledged that "the sellers of processing and refining facilities would be the direct beneficiaries of the capital gains tax deferral." App., *infra*, 17a. The court nevertheless deemed it "likely" that the processors' ability to defer the taxes "would benefit [appellees] in a concrete way," *ibid.*, by increasing appellees' chances of purchasing such facilities on favorable terms. See *id.* at 17a-18a ("the fact that the seller would be able to defer the taxes would, at the very least, likely give [respondents] some room to negotiate in terms of price"). This Court has been especially reluctant, however, to conclude that a plaintiff has a judicially cognizable interest in the potential tax liability of another private party. See, *e.g.*, *Simon* v. *Eastern Kentucky Welfare Rights Organization*, 426 U.S. 26 (1976); *Allen* v. *Wright*, *supra*. Appellees' purported injury is too speculative to satisfy the standing requirements of Article III.[6]

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[6] The district court's reliance (see App., *infra*, 16a) on *Northeastern Florida Chapter of Associated General Contractors of America* v. *City of Jacksonville*, 508 U.S. 656 (1993), is

b. *City of New York* presents a more difficult jurisdictional question. The State of New York, whose entitlement to Medicaid reimbursement is most directly affected by the canceled budgetary authority, has not filed suit to challenge the cancellation. Even if the pending waiver applications submitted to HCFA by the State are ultimately denied, nothing in federal law would compel the State to recoup the lost Medicaid funds from appellees. Any injury appellees may ultimately suffer would depend upon the decision of state officials to seek recoupment under New York law. It is therefore unclear whether such injury would be "fairly traceable," *Bennett* v. *Spear*, 117 S. Ct. 1154, 1161 (1997), to the President's cancellation.[7] The pendency of the State's waiver

misplaced. The plaintiff in *Northeastern Florida* asserted that its members had been denied the opportunity to bid on certain government contracts on the basis of race, in violation of the Equal Protection Clause. See *id.* at 658-659. The Court held that the plaintiffs could establish standing without alleging that they would have obtained particular contracts if the challenged discrimination had not occurred. See *id.* at 666 ("The 'injury in fact' in an equal protection case of this variety is the denial of equal treatment resulting from the imposition of the barrier, not the ultimate inability to obtain the benefit."). Appellees, by contrast, have not asserted an equal protection claim. Nor do they contend that the challenged cancellation has directly imposed any burden upon them. Their challenge is instead directed at the purportedly unlawful denial of favorable tax treatment to other private parties.

[7] In some instances this Court has recognized that a plaintiff may satisfy the causation requirement of Article III by demonstrating that private parties are likely to respond to federal action in a manner that will injure the plaintiff. See *e.g.*, *United States* v. *Students Challenging Regulatory Agency Procedures (SCRAP)*, 412 U.S. 669, 688-690 (1973); *Duke Power Co.* v. *Carolina Environmental Study Group Inc.*, 438

applications introduces a further element of uncertainty, since the State itself will suffer a loss of federal funds as a result of the challenged cancellation only if and when those applications are ultimately denied. For the time being, the State—and through it the hospital appellees—are receiving all reimbursements claimed, without regard to the disputed taxes. Although we regard the jurisdictional issue in this case as much closer than in *Snake River*, we believe that, on balance, the causal nexus between the President's cancellation and any injury appellees now claim to suffer does not satisfy the requirements of Article III.

2. The district court also erred in holding the Line Item Veto Act to be unconstitutional. The Act vests the President with authority to determine, in accordance with statutorily prescribed standards and procedures, whether items of spending that Congress has appropriated will in fact be spent. That grant of authority is fully consistent with historical practice. From the beginning of the Republic, Congress has frequently conferred upon the President substantial discretion over the expenditure of appropriated funds. See pp. 3-7, *supra*. The settled historical practices of Congress and the Executive Branch regarding spending discretion strongly support the political Branches' shared judgment that the Act is constitutional.

U.S. 59, 74-78 (1978). It is unclear, however, whether a plaintiff can establish standing when the postulated causal chain depends upon discretionary action by a sovereign State, compare *Warth* v. *Seldin*, 422 U.S. 490, 509 (1975)—particularly when the State itself is more directly affected by the federal action but has declined to file suit.

The district court concluded that the Line Item Veto Act allows the President to usurp the legislative power by fashioning laws "different from those consented to by both Houses of Congress." App., *infra*, 24a. That conclusion is erroneous. Congress retains the power "to exempt a given appropriations bill (or a given provision in an appropriations bill) from the" President's cancellation authority under the Act. *Raines* v. *Byrd*, 117 S. Ct. 2312, 2320 (1997). Because Congress is presumed to legislate with an awareness of existing law, see, *e.g.*, *Miles* v. *Apex Marine Corp.*, 498 U.S. 19, 32 (1990); *Goodyear Atomic Corp.* v. *Miller*, 486 U.S. 174, 184-185 (1988), a tax or spending bill that does not otherwise specify the scope of the President's discretion must be understood to authorize him either to spend, or to cancel, each item covered by the Act. Thus, the President's exercise of his cancellation authority does not produce laws "different from those consented to by both Houses of Congress," App., *infra*, 24a, since the possibility that individual items will be cancelled is implicit in the tax or spending law at the time it is passed. The President's cancellation of a tax or spending item subject to the Act is therefore a valid exercise of his power to execute the laws, not a repeal or amendment of a congressional enactment.

CONCLUSION

The Court should note probable jurisdiction.

Respectfully submitted.

SETH P. WAXMAN
Solicitor General
FRANK W. HUNGER
Assistant Attorney General
EDWIN S. KNEEDLER
Deputy Solicitor General
MALCOLM L. STEWART
Assistant to the Solicitor General
DOUGLAS N. LETTER
SCOTT R. MCINTOSH
Attorneys

FEBRUARY 1998

APPENDIX A

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civ. No. 97-2393 (TFH)

CITY OF NEW YORK, ET AL., PLAINTIFF

v.

WILLIAM J. CLINTON, ET AL., DEFENDANT

Civ. No. 97-2463 (TFH)

SNAKE RIVER POTATO GROWERS, INC., ET AL.
PLAINTIFF

v.

ROBERT E. RUBIN, ET AL., DEFENDANT

[Feb. 12, 1998]

MEMORANDUM OPINION

This case requires the Court to adjudge the constitutionality of the Line Item Veto Act. Before reaching the constitutional challenge, however, the Court must first conclude that it has jurisdiction to hear the case, by determining that Plaintiffs in this action have Article III standing. Based on the briefs and exhibits submitted by the parties and *amici curiae*[1], and argument at a hearing conducted on

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[1] *Amici curiae* briefs were submitted by Senators Robert C. Byrd, Daniel Patrick Moynihan, and Carl Levin, in support of Plaintiffs' motions to declare the Line Item Veto Act uncon-

January 14, 1998, the Court finds that these Plaintiffs have demonstrated the requisite injury to have standing; furthermore, it finds that the Line Item Veto violates the procedural requirements ordained in Article I of the United States Constitution and impermissibly upset the balance of powers so carefully prescribed by its Framers. The Line Item Veto Act therefore is unconstitutional.

I. Background

A. The Line Item Veto Act[2]

Unable to control its voracious appetite for "pork," Congress passed, and the President signed into law, the Line Item Veto Act. Pub. L. No. 104-130, 110 Stat. 1200 (1996).[3] The Act is designed as an amendment to, and an enhancement of, Title X of the Congressional Budget and Impoundment Control Act of 1974 ("ICA"). 2 U.S.C. §§ 681 *et seq.* The ICA authorized the President to defer spending of Congressional appropriations during the course of a fiscal year or

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stitutional; the United States Senate, in support of the constitutionality of the Act; and Congressman Dan Burton, in support of the constitutionality of the Act.

[2] The Constitutionality of the Line Item Veto Act was litigated in this court a mere six months before the complaints in this case were filed. *See Byrd v. Raines*, 956 F. Supp. 25 (D.D.C. 1997). In *Byrd*, Judge Jackson declared the Act unconstitutional. *Id.* On a direct appeal of that District Court decision, the Supreme Court held that appellees, six members of Congress, lacked standing to bring the suit, and therefore vacated the District Court opinion and directed that the complaint be dismissed. *See Raines* v. *Byrd*, 117 S.Ct. 2312, 2323 (1997).

[3] President Clinton signed the Line Item Veto Act into law on April 9, 1996, it became effective January 1, 1997, and it remains effective until January 1, 2005.

other period of availability, as long as Congress intended for those appropriations to be permissive rather than mandatory. *Id.* The President also could propose the total rescission of an appropriation to Congress, but unless Congress approved the rescission, the President was obligated to release the funds. *Id* §§ 683(b), 688. Because it generally failed to make the rescissions recommended by the President, Congress found this arrangement to be an unsatisfactory mechanism for controlling deficit spending.[4]

As large deficits persisted, Congress considered various amendments to the ICA to alleviate its perceived defects. One proposal, called "expedited rescission," would amend the ICA to streamline the process for Congressional approval of rescissions proposed by the President. *See, e.g.*, H.R. 2164, 102d Cong. (1991). Other proposals included amending the Constitution to give the President a line item veto, *see, e.g.*, H.R.J. Res. 6, 104th Cong. (1995); H.R.J. Res. 4, 103d Cong. (1993), or adopting a congressional procedure for presenting each spending provision to the President as a separate bill, for approval or veto. *See, e.g.*, S. 137, 104th Cong. (1995); S. 238, 104th Cong. (1995). Congress settled on an "enhanced rescission" proposal, codified in the Line Item Veto Act, that makes Executive rescissions automatic in defined circumstances, subject to congressional disapproval. By making appropriations "conditional" during the period in which the President has authority to veto provisions, and "by placing the onus on Congress to overturn the President's cancellation of spending and

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[4] Since 1974, Presidents have recommended $72.8 billion in rescissions, but Congress has passed legislation rescinding only $22.9 billion. S. Rep. No. 104-13, at 2 (1995).

limited tax benefits," H.R. Conf. Rep. No. 104-491, at 16 (1996), the Line Item Veto Act reverses the appropriation presumptions under the ICA.

The Line Item Veto gives the President the authority to "cancel in whole," at any time within five days (excluding Sundays) after signing a bill into law, (1) "any dollar amount of discretionary budget authority," (2) "any item of new direct spending;" and (3) "any limited tax benefit." 2 U.S.C. § 691a (1997).

A "dollar amount of discretionary budget authority" is defined as "the entire dollar amount of budget authority" that is specified in the text of an appropriations law or found in the tables, charts, or explanatory text of statements or committee reports accompanying a bill. *Id.* at § 691e(7). An "item of new direct spending" is a specific provision that will result in "an increase in budget authority or outlays" for entitlements, food stamps, or other specified programs. *Id.* at §§ 691e(8), 691e(5). A "limited tax benefit" is a revenue-losing provision that gives tax relief to 100 or fewer beneficiaries in any fiscal year, or a tax provision that "provides temporary or permanent transitional relief for ten or fewer beneficiaries in any fiscal year."[5] *Id.* at § 691e(9).

With respect to any dollar amount of discretionary budget authority, the Act defines "cancel" as "to rescind." *Id.* at § 691e(4)(A). Cancellation of an item of new direct spending or a limited tax benefit prevents it from having "legal force or effect." *Id.* at § 691e(4)(B). Canceled funds may not be used for any

[5] The Joint Congressional Committee on Taxation is responsible for identifying cancelable items in tax bills. *Id.* at § 691f.

purpose other than deficit reduction. *Id.* at §§ 691c(a)-(b).

To exercise cancellation authority, the President must submit a "special message" to Congress within five calendar days of signing a bill containing the item being canceled. *Id.* at § 691a(c)(1). The President's special message must set forth the reasons for the cancellation; the President's estimate of the "fiscal, economic, and budgetary effect" of the cancellation; an estimate of "the . . . effect of the cancellation upon the objects, purposes and programs for which the canceled authority was provided;" and the geographic distribution of the canceled spending. *Id.* at § 691a(b). The President may exercise this authority only after determining that doing so will "(i) reduce the Federal budget deficit; (ii) not impair any essential Government functions, and (iii) not harm the national interest." *Id.* at § 691(a)(A).

A cancellation takes effect upon Congress' receipt of the President's special message. *Id.* at § 691b(a). Congress can restore a canceled item by passing a "disapproval bill," which is not subject to the President's Line Item Veto authority, but is subject to the veto provisions detailed in Article I. *Id.* Disapproval bills must comport with the requirements prescribed in Article I, section 7, although the Line Item Veto Act provides for expedited consideration of these bills. *Id.* at §§ 691e(6)-692(c). If a disapproval bill is enacted into law, the President's cancellation is nullified and the canceled items become effective. *Id.* at § 691b(a).

In terms of judicial review, the Line Item Veto Act provides that "[a]ny member of Congress or any individual adversely affected . . . may bring an action in the United States District Court for the District of

Columbia, for declaratory judgment and injunctive relief on the ground that any provision of [the Act] violates the Constitution." *Id.* at § 692(a)(1). The Act provides for direct appeal to the Supreme Court and directs both Courts "to expedite to the greatest possible extent the disposition of any matter brought under [this provision.]" *Id.* at 692(b)-(c)_.

B. Factual Background in *New York v. Clinton*

The City of New York plaintiffs consist of the City itself, two hospital associations (Greater New York Hospital Association, or GNYHA, and New York City Health and Hospitals Corporation, or NYCHHC), one hospital (the Jamaica Hospital Medical Center), and two unions that represent health care employees (District Council 37, American Federation of State, County and Municipal Employees and Local 1199, National Health and Human Service Employees).

The City of New York plaintiffs' claims arise out of a dispute over Federal Medicaid payments to the State of New York. The Health Care Financing Administration of the Department of Health and Human Services ("HCFA") provides federal financial participation ("FFP") to match certain state Medicaid expenditures. (*See* Brown Decl., Defs' Ex. 1 at ¶3.) The FFP provided by the federal Medicaid program to match state expenditures is reduced by the revenue that the state receives from health care related taxes. *Id.* at ¶4. The FFP is not reduced, however, by tax revenue that meets specified criteria, including that the taxes are "broad-based" (*i.e.*, applied to all health care providers within the same class) and "uniform" (*i.e.*, applied equally to all taxed providers). *Id.*

New York State taxes its health care providers and uses this tax revenue to pay for health care for the poor. (*See* Wang Decl., Pls.' Ex. 2 at ¶4.) The State exempts certain revenues (*e.g.*, those derived from particular charities) of some health care providers (*e.g.*, the plaintiff health care providers) from the health care provider tax. (*See* van Leer Decl., Pls' Ex. 3 at ¶3.) That is, New York exempts plaintiff health care providers from taxes that other health care providers must pay.

On December 19, 1994, HCFA notified New York State that 19 of its tax programs violated HCFA's requirements. (*See* Dear State Medicaid Director Letter, Pls.' Ex. 2D.) Since then, New York has submitted over 60 waiver applications to HCFA, which to date have neither been approved nor denied. (*See* Wang Decl., at ¶7.) A finding by HCFA that a State's taxes are impermissible effects a disallowance of the State's Medicaid expenditures and allows HCFA to recoup the matching funds that it has already paid to the State. *Id.* at ¶6. If HCFA denies a waiver request, the State may appeal the denial to the Departmental Appeals Board. (*See* Brown Decl. at ¶6.)

If HCFA ultimately deems New York's taxes impermissible, New York State law provides that those health care providers that were previously excluded from the taxes must pay them retroactively. (*See* Wang Decl. at ¶8.) For example, NYCHHC's tax liability is estimated to be more than $4 million for each year at issue. In total, $2.6 billion may be subject to recoupment from New York State. *Id.* at ¶¶7-8.

The Balanced Budget Act of 1997, Pub. L. No. 105-33, included a provision, section 4722(c), that would have alleviated this exposure to liability. It established that New York State expenditures derived from certain health care provider taxes qualified for FFP under the Medicaid program. *Id.* at ¶9. This section signified that New York State would not have to return the funds in question to HCFA; for Plaintiffs, it meant that they were relieved of their liability to New York State should HCFA deny New York's waiver requests.

The President signed the Balanced Budget Act into law on August 5, 1997. Six days later, he identified section 4722(c) as an item of new direct spending and canceled it, thus reinstating Plaintiffs' exposure to liability. Cancellation No. 97-3, 62 Fed. Reg. 43,263 (1997). The President adopted the Congressional Budget Office's estimate that the cancellation of section 4722(c) would reduce the federal deficit by $200 million in FY 1998. *Id.*

C. Factual Background in *Snake River Potato Growers, Inc. v. Rubin*

Snake River Potato Growers, Inc. is, according to Plaintiffs, an "eligible farmers' cooperative" within the meaning of section 968 of the Taxpayer Relief Act. (*See* Cranney Decl., Pls' Ex. 2 at ¶9.) Its membership consists of approximately 30 potato growers located throughout Idaho, who each owns shares of the cooperative. Plaintiff Mike Cranney, a potato grower with farms located in Idaho, is a member, Director and Vice Chairman of the cooperative. *Id.* at ¶2. Snake River was formed in May 1997 to assist Idaho potato growers in marketing their crops and stabilizing prices, in part though a strategy of acquiring potato processing facilities. *Id.* at ¶9 These facilities allow individual growers to aggregate their crops and process and deliver them to market jointly. Furthermore, they allow members to retain revenues formerly paid out to third-party processors. *Id.* at ¶13.

On August 5, 1997, the President signed into law the Taxpayer Relief Act, Pub. L. No. 105-34, 111 Stat. 788 ("TRA"). Section 968 of the TRA amended the Internal Revenue Code to allow the owner of the stock of a qualified agricultural refiner or processor to defer recognition of capital gains on the sale of such stock to an eligible farmers' cooperative. That is, it would have allowed a processor to sell its facilities to an eligible cooperative without paying tax currently on any capital gain. The stated purpose of section 968 was to aid farmers' cooperatives in the purchase of processing and refining facilities.[6] (*See* Dear Colleague Letter by Reps. Roberts and Stenholm of 12/1/95, Pls.' Ex. 5.) On August 11, 1997, the President identified this provision as a "limited tax benefit," within the meaning of the Line Item Veto Act, and canceled it. Cancellation No. 97-2, 62 Fed. Reg. 43,267 (1997). In his cancellation message, the President estimated that sellers could have used section 968 to defer paying $98 million in taxes over the next five years, and $155 million over the next ten. *Id.*

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[6] Before the passage of section 968, farmers' cooperatives were at a competitive disadvantage vis a vis investor-owned business. Co-ops could not exchange their stock for the stock of processing companies, because a cooperative' stock can be held only by its members. (*See* Cranney Decl. at ¶ 5.)

Snake River had actively pursued at least one transaction that could have taken advantage of section 968. In May 1997, when Congress initially was considering the proposals in section 968, Mike Cranney and another officer of Snake River discussed with Howard Phillips, a principal owner of Idaho Potato Packers ("IPP"), the purchase by Snake River of the stock of a company that owned an IPP potato processing facility in Blackfoot, Idaho. (*See* Cranney Decl. at ¶19.) Plaintiffs contend that this company would have been a "qualified processor" under section 968 and that a deal with Phillips could have been structured so as to comply with all requirements of section 968. *Id.* at ¶¶21-23. Plaintiffs maintain that Phillips was interested in pursuing the sale because he could defer taxes on his gain if section 968 passed. *Id.* at ¶23. The negotiations did not continue after the President canceled section 968. *Id.* at ¶24.

II. Justiciability

Before tackling the merits of this case, the Court must first determine whether it has jurisdiction to hear it. Under Article III, section 2 of the Constitution, the federal courts have jurisdiction over a dispute only if it is a "case" or "controversy." *See Raines v. Byrd*, 117 S.Ct. 2312 (1997). The Supreme Court has regarded the case or controversy prerequisite as a "bedrock requirement" and has observed that "[n]o principle is more fundamental to the judiciary's proper role in our system of government than the constitutional limitation of federal-court jurisdiction to actual cases or controversies." *Id. citing Valley Forge Christian College v. Americans United for Separation of Church and State, Inc.*, 454 U.S. 464, 471 (1982).

The central jurisdictional requirement that controls the analysis of these consolidated cases is the doctrine of standing. The Supreme Court has emphasized that the standing inquiry is "especially rigorous when reaching the merits of the dispute would force us to decide whether an action taken by one of the other two branches of the Federal Government was unconstitutional." *Raines*, 117 S.Ct. at 2317-18. It has cautioned,

> "the law of Art. III standing is built on a single basic idea—the idea of separation of powers." In the light of this overriding and time-honored concern about keeping the Judiciary's power within its proper constitutional sphere, we must put aside the natural urge to proceed directly to the merits of this important dispute and to 'settle' it for the sake of convenience and efficiency.

It is with these admonitions soundly in mind that this Court proceeds with its standing analysis regarding the plaintiffs now before it.

A. Standing

While the Supreme Court has candidly acknowledged that "the concept of 'Article III Standing' has not been defined with complete consistency in all of the various cases decided by this Court which have discussed it,"[7] *Valley Forge Christian College*, 454 U.S. at 475, certain basic principles have been distilled from the Court's decisions:

> To establish an Art. III case or controversy, a litigant first must clearly demonstrate that he has

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[7] *But see* Ralph Waldo Emerson, *Essays: Self-Reliance* (1841), "A foolish consistency is the hobgoblin of little minds."

suffered an "injury in fact." That injury, we have emphasized repeatedly, must be concrete in both a qualitative and temporal sense. The complainant must allege an injury to himself that is "distinct and palpable," as opposed to merely "abstract," and the alleged harm must be actual or imminent, not "conjectural" or "hypothetical." Further, the litigant must satisfy the "causation" and "redressability" prongs of the Art. III minima by showing that the injury "fairly can be traced to the challenged action" and "is likely to be redressed by a favorable decision." The litigant must clearly and specifically set forth facts sufficient to satisfy these Art. III standing requirements. A federal court is powerless to create its own jurisdiction by embellishing otherwise deficient allegations of standing.

Whitmore v. Arkansas, 495U.S. 149 (1990) (internal citations omitted). Here, the principal standing inquiry is whether Plaintiffs can demonstrate sufficient injury, "actual or threatened." *See Valley Forge Christian College*, 454 U.S. at 472.

Although these plaintiffs do not neatly fit into any category of plaintiffs that the Supreme Court has already found to have standing, this Court finds that they meet the Article III requirements. The President directly injured both the City of New York plaintiffs and the Snake River plaintiffs when he canceled legislation that provided a benefit to them.

1. City of New York Plaintiffs[8]

Plaintiffs suffered an immediate, concrete injury the moment that the President used the Line Item Veto to cancel section 4722(c) and deprived them of the benefits of that law. The Court thus finds that Plaintiffs have suffered sufficient injury to have Article III standing.

When the President signed the Balanced Budget Act of 1977, section 4722(c) became law. *See La Abra Silver Mining Co. v. United States*, 175 U.S. 423, 454 (1899). Consequently, every New York State tax program held not to meet HCFA's requirements was deemed permissible by federal legislation. The State's liability was eliminated and the hospitals upon which that liability would fall were exonerated of their burden. Plaintiffs possessed a valuable protection against any liability that otherwise might befall them. This protection constituted a benefit to Plaintiffs. When the President canceled section 4722(c), Plaintiffs were divested of the benefit conferred upon them by the legislation. In the simplest terms, Plaintiffs had a benefit, and the President took that benefit away. That is injury.

Defendants argue that, because there are still administrative options available to Plaintiffs, Plaintiffs were not injured by the President's cancellation of this legislative solution. The Court disagrees. Plaintiffs had two independent avenues that they could

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[8] The Court's standing analysis focuses on the plaintiff health care providers. As long as the Court determines that at least one of the New York plaintiffs has standing, it does not need to consider the standing issue as to the other plaintiffs in that action. *See Bowsher* v. *Synar*, 478 U.S. 714, 721 (1986).

have pursued to avoid potential liability: one legislative and one administrative. The legislative approach yielded complete success. The fact that there are two mechanisms that could produce a result does not mean that a party is not injured when one of those mechanisms produces the desired result, and then that result is obliterated. Analogously, if Plaintiffs were pursuing a challenge to a final agency action, the fact that there might also be pending legislation would not deprive them of standing to challenge the final agency action. *See INS v. Chadha*, 462 U.S. 919, 936-37 (1938) (Burger, C.J.) (finding that the existence of other speculative avenues of relief does not constitute a prudential bar to the Court's consideration of a case). The Court finds that the availability of administrative relief does not eliminate Plaintiffs injury in the legislative arena.

Plaintiffs also have shown with reasonable certainty that they will be liable for millions of dollars now that Section 4722(c) has been canceled. Under the current law, it is highly likely that the State of New York will be required to return to HCFA at least some of the funds that HCFA paid to the State. First of all, HCFA has already deemed the taxes impermissible. HHS has stated that in the absence of legislation (like Section 4277(c)), by August 1998, "the Secretary will move forward to complete the process already begun to apply with full force the current law." (Dear State Medicaid Directors Letter, Pls.' Ex. 2D.) Next, to exercise Line Item Veto authority, the President was required to certify that the veto *would* reduce the federal deficit; he complied with that requirement by certifying that cancellation of Section 4277(c) *would* result in a reduction in federal

outlays in FY 1998 of $200 million. Cancellation No. 97-3, 62 Fed. Reg. 43,263 (1997). Finally, at a press briefing on the cancellation, Office of Management and Budget Director Franklin Raines described Section 4722(c) as "a provision that provided special relief to the State of New York for provider taxes that *had been determined by HCFA to be illegal* under a 1991 statute." (Pls.' Ex 2C (emphasis added).) Raines added that "New York will not be able" to use the taxes to increase its FFP. *Id.* Thus, this Court concludes that it is more likely than not that the State of New York will be required to refund at least some of the payments it has received from HCFA.

Likewise, the Court finds that Plaintiffs are highly likely to be required to indemnify the State for its HCFA recoupments. Defendants do not dispute that New York law imposes automatic liabilities upon hospitals and nursing homes upon a finding that New York's provider taxes are not permissible. (*See* Wang Decl., Pls.' Ex. 2 at ¶8.) Plaintiffs would avoid liability only in the unlikely event that the State of New York would rescind these laws or decline to enforce them. Again, the Court finds that this scenario is less likely than one in which Plaintiffs are required to indemnify the State.

Therefore, by finding that the City of New York plaintiffs have demonstrated sufficient injury, the Court concludes that they have standing to challenge the constitutionality of the Line Item Veto Act.

2. Snake River Plaintiffs

Like the City of New York plaintiffs, the Snake River plaintiffs suffered an immediate, concrete injury when the President canceled section 968. Sec-

tion 968 conferred a benefit on Plaintiffs by putting them on equal footing with investor-owned businesses. Before section 968 was passed, investor-owned businesses could structure acquisitions of processing facilities as tax-deferred stock-for-stock exchanges. Farmers' cooperatives could not exchange their stock because a cooperative's stock can be held only by its members. Section 968 would have allowed sellers to defer capital gains taxes on sales to farmers' co-ops, thus putting co-ops in the same competitive position as investor-owned businesses.[9]

The Supreme Court has held that the inability to compete on an equal basis in the bidding process in injury in fact. *See Northeastern Florida Chapter of the Associated Gen. Contractors of America v. City of Jacksonville*, 508 U.S. 656 (1993). In that case, the Court found that contractors that regularly bid on, and performed, construction work for the City of Jacksonville, and would have bid on designated set-aside contracts but for the restrictions imposed, had standing, even though they failed to allege that they would have been awarded a contract but for the challenged ordinance. Here, regardless of whether Plaintiffs can prove that they would have actually consummated purchases under section 968, they are

[9] As a simplified example, if an investor-owned business and a farmers' co-op each offered $1 million for a processing plant, the investor-owned business would always prevail because the processor would actually net $1 million from that sale, whereas it would net less than $1 million from the sale to the farmers' co-op, because it would have to pay capital gains tax on that sale. Therefore, to compete for a piece of property with an investor-owned business, the farmers co-op would have to offer more than the investor-owned business to make up for the capital gains tax that the purchaser would have to pay.

injured by the fact that section 968 put them on equal footing with their competitors and its cancellation disabled them from competing on an equal basis. When the President canceled section 968, Plaintiffs were divested of the benefit conferred upon them by the legislation and therefore were concretely injured.

In addition, it is highly likely that the Snake River plaintiffs would have been able to take advantage of the benefits conferred by section 968 and that they therefore will be injured by the President's cancellation of it. Snake River Potato Growers, Inc. was formed for the purpose of acquiring potato processing facilities. Although the sellers of processing and refining facilities would be the direct beneficiaries of the capital gains tax deferral, it is likely that the fact that the processors would be able to defer these taxes would benefit Plaintiffs in a concrete way.[10] For example, in a deal in which there are no other prospective purchasers, even if a seller chose to completely absorb the monetary benefits of the capital gains tax deferral, the fact that the seller would be able to defer the taxes would, at the very least, likely give Plaintiffs some room to negotiate in terms of

[10] Defendants argue that because Plaintiffs themselves would not have received the capital gains tax deferral, they are not the beneficiaries of section 968. The Court disagrees. The express purpose of section 968 was to help farmers to buy refining and processing facilities by eliminating a tax obstacle facing sellers who sell to them. Thus, although the direct recipient of the tax deferral was the sellers, it was plainly understood that the intention was to benefit the farmers; a cancellation of the tax deferral would really injure the farmers, not the owners of the processing plants, because the owners could already get the tax deferral simply by selling to investor-owned businesses.

price; in a competitive situation, it would allow Plaintiffs to pay a lower purchase price than they would have in a scenario in which they were not on equal footing with the other would-be purchasers.[11]

While Plaintiffs cannot demonstrate with certainty that they would be able to take advantage of the benefits provided by section 968, such certainty is not required. In *Bryant v. Yellen*, 447 U.S. 352 (1980), for example, farm workers wishing to purchase land had standing even though they could not with certainty establish that they would be able to purchase it. In that case, a reclamation law forbid delivery of reclamation project water to any irrigable land held in private ownership by one owner in excess of 160 acres. If this law were enforced, owners of land in excess of 160 acres would probably sell their acreage and would probably be forced to sell at below current market prices. The Court reasoned that farm workers who desired to purchase farmlands in the area had standing, because it was "unlikely" that the owners of excess lands would sell at below-market prices without the law, and it was "likely" that excess lands would become available at less than market prices if the law were applied.

Likewise, the Snake River plaintiffs need only show that the existence of section 968 would have made it more likely that they could acquire processing and refining facilities. As illustrated above, by putting Plaintiffs on equal footing with other bidders, it is likely that Plaintiffs would be able to make a

[11] For example, in the illustration provided in footnote 9, *supra*, instead of having to offer, say, $1.3 million to compete with the investor-owned business, the co-op could offer an amount in the $1 million range.

purchase by offering less than they would have without the benefit of section 968. Also, the tax deferral would, at the very least, give Plaintiffs more room to negotiate in terms of price. Thus, section 968 would have helped the Snake River plaintiffs in their efforts to purchase processing and refining facilities.

Defendants argue that Plaintiffs cannot meet the redressability requirement of the standing doctrine. They cite *Simon v. Eastern Ky. Welfare Rights Org.*, 426 U.S. 26 (1976), and *Allen v. Wright*, 468 U.S. 737 (1984), to support their contention that there is no way for the Court to know whether any sellers would be motivated by the benefits of section 968 to sell to Plaintiffs. This case is distinguishable from *Simon* and *Allen*, however, because here, Plaintiffs have sufficiently demonstrated that if this Court struck the Line Item Veto Act and reinstated section 968, they would be more likely to be able to competitively bid on, and prevail in purchasing, processing and refining facilities.

In *Simon*, the Supreme Court determined that low-income plaintiffs lacked standing to challenge a tax regulation establishing the amount of free medical care that a charitable hospital must provide to maintain its tax-exempt status. The Supreme Court explained that it was "purely speculative" to assume that the challenged regulation cause charitable hospitals to provide less service than they would otherwise provide free of charge, and it was "equally speculative" to assume that increasing the amount of free services required for tax exemption would in fact increase the amount of free service provided. *Simon*, 426 U.S. at 42-43. The Court commented that the hospitals might elect to forgo favorable tax treatment

to avoid the financial drain of providing more free treatment.

In *Allen*, the Supreme Court concluded that parents of public school children lacked standing to challenge the legality of a tax exemption that benefitted racially discriminatory private schools. The plaintiffs claimed that the tax exemption made it easier for white children to enroll in private schools, the result being that the public schools were less diverse, to the plaintiffs' detriment. The Supreme Court indicated that it would be "entirely speculative" to conclude that withdrawal of the tax exemption would lead any private school to change its exclusionary policies. *Allen*, 468 U.S. at 758.

In both of these cases, there was arguably some disincentive to the institutions' taking advantage of the tax benefit. The hospitals in *Simon* would have to admit more non-paying patients; the schools in *Allen* would have to admit a more diverse student body, against their wishes. In these cases, it may indeed have been speculative to attempt to determine whether the hospitals and schools would be willing to make these changes in order to take advantage of the tax incentive. Here, Defendants do not allege that there is any "cost" to the selling processors and refiners in taking advantage of the tax benefits that section 968 would offer. Unlike the schools and hospitals in *Allen* and *Simon*, the sellers' decision likely would be a purely financial one.

Defendants also contend that Plaintiffs submissions regarding Mike Cranney's planned purchase of the IPP processing facility are barren of facts that would demonstrate whether section 968 would have had any impact on that transaction, because of the

specific requirements of section 968.[12] While the Court will not speculate as to whether Carnney's deal with Phillips would have been brought to fruition but for the President's cancellation of section 968, or even if that particular deal would have satisfied the requirements of section 968, the negotiations at the very least make it clear to the Court that Plaintiffs were actively spending their time and money pursing purchases and that the President's cancellation of section 968 interfered with those plans. *Compare Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1991) (holding that plaintiffs lacked standing to challenge an environmental regulation because, although plaintiffs had a desire to return to the habitat of certain endangered species, they failed to present any concrete plans of an actual visit).

The Court finds that the Snake River plaintiffs suffered an injury when the President canceled Section 968. Plaintiffs lost the benefit of being on equal footing with their competitors and will likely have to pay more to purchase processing facilities now that the sellers will not being able to take advantage of section 968's tax breaks. The Court therefore concludes that the Snake River plaintiffs have demonstrated sufficient injury to have Article III standing.

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[12] To qualify for a deferral of capital gains taxes under section 968(g), the seller must transfer 100% of the stock of the qualified processor to the farmers' cooperative. Section 968(a) requires that, during the one-year period preceding the date of sale, the qualified refiner or processor purchase at least 50% of the products to be refined or processed from the farmers who make up the eligible farmers' cooperative that is purchasing the corporations' stock or from the cooperative itself.

III. Constitutional Analysis of the Line Item Veto

Having determined that it has jurisdiction to hear this case, the Court now turns to the merits of Plaintiffs' constitutional challenges. The Court begins with the presumption that the Line Item Veto Act is valid. *See, e.g., INS v. Chadha*, 426 U.S. 919, 944 (1983). The *Chadha* Court cautioned, however,

> The fact that a given law or procedure is efficient, convenient, and useful in facilitating functions of government, standing alone, will not save it if it is contrary to the Constitution. Convenience and efficiency are not the primary objectives—or the hallmarks—of democratic government. . .

Id.

The Court's constitutional analysis is two-fold. First, the Court examines the Line Item Veto Act in terms of the procedural requirements set forth in Article I, section 7; next, the Court discusses the doctrine of separation of powers. The Court concludes that the Line Item Veto Act fails both of these examinations.

A. Procedural Requirements of Article I

The Constitution carefully prescribes certain formal procedures that must be observed in the enactment of laws. The Line Item Veto Act impermissibly attempts to alter these constitutional requirements through mere legislative action.[13] Because the Act

[13] This approach has been cautioned against since the founding of our democracy. "If in the opinion of the People, the distribution or modification of the Constitution powers be in any particular wrong, let it be corrected by an amendment in the way which the Constitution designates. But let there be no change by usurpation; for though this, in one instance, may be the instrument of good, it is the customary weapon by which free governments are destroyed." George Washington, Farewell Address, September 19, 1796 *in* 35 *The Writings of George Washington* 229 (John C. Fitzpatrick ed., 1940).

violates Article I's "single, finely wrought and exhaustively considered, procedure," *Chadha*, 462 U.S. at 951, it is unconstitutional.

Article I, section 7 of the Constitution sets forth dual requirements for the enactment of statutes: bicameral passage and presentment to the President. *See* U.S. Const. art. I, § 7, cl. 2 ("Every Bill which shall have passed the House of Representatives and the Senate, shall, before it become a Law, be presented to the President of the United States; If he approves he shall sign it, but if not he shall return it . . .") (the Bicameralism and Presentment Clauses would serve essential constitutional functions. "By providing that no law could take effect without the concurrence of the prescribed majority of the Member os both Houses, the Framers reemphasized their belief . . . that legislation should not be enacted unless it has been carefully and fully considered by the Nation's elected officials." *Chadha*, 462 U.S. at 948-49. At the heart of the notion of bicameralism is the requirement that any bill must be passed by both Houses of Congress in exactly the same form.

The Constitution requires that both the amendments and repeal of statutes also conform with these Article I requirements. *Chadha*, 462 U.S. at 954. It makes only four narrow exceptions to this single mechanism by which the provisions of law may be canceled. *See* U.S. Const. art. I, § 2, cl. 6; art. I, § 3, cl.

5; art. II, § 2, cl. 2. Congress may not add to this exclusive list without amending the Constitution. In the words of the *Chadha* court,

> The bicameral requirement, the Presentment Clauses, the President's veto, and Congress' power to override a veto were intended to erect enduring checks on each Branch and to protect the people from the improvident exercise of power by mandating certain prescribed steps. To preserve those checks, and maintain the separation of powers, the carefully defined limits on the power of each Branch must not be eroded. To accomplish what has been attempted [here] requires action in conformity with the express procedures of the Constitution's prescription for legislative action: passage by a majority of both Houses and presentment to the President.

Chadha, 462 U.S. at 957-58.

Here, while the initial passage of the Balanced Budget Act and the Taxpayer Relief Act complied with the Article I requirements, the Line Item Veto Act then authorized the President to violate those requirements by producing laws that had not adhered to those requirements. Both Houses of Congress, through a process of discussion and compromise, had agreed upon the exact content of the Balanced Budget Act and the Taxpayer Relief Act. These laws reflected the best judgment of both Houses. The laws that resulted after the President's line item veto were different from those consented to by both Houses of Congress. There is no way of knowing whether these laws, in their truncated form, would have received the requisite support from both the House and the Senate. Because the laws that

emerged after the Line Item Veto are not the same laws that proceeded through the legislative process, as required, the resulting laws are not valid.

Furthermore, the President violated the requirements of Article I when he unilaterally canceled provisions of duly enacted statutes. Unilateral action by any single participant in the law-making process is precisely what the Bicameralism and Presentment Clauses were designed to prevent. Once a bill becomes law, it can only be repealed or amended through another, independent legislative enactment, which itself must conform with the requirements of Article I. Any rescissions must be agreed upon by a majority of both House of Congress. The President cannot single-handedly revise the work of the other two participants in the lawmaking process, as he did here when he vetoed certain provisions of these statutes.

Defendants, curiously content that, despite its title, the Line Item Veto Act does not authorize the President to "veto" anything. They maintain that under the Act, "[t]he Bill stays as law, unless the President were to exercise his constitutional power to veto. Nothing changes about the bill. The law remain law. . . The law remains on the books and the law remains valid." (Tr. of Mot. Hr'g, Jan. 14, 1998 at 71, 78.) The Court does not follow Defendants' logic. In the words of Richard Cardinal Cushing, "When I see a bird that walks like a duck and swims like a duck and quacks like a duck, I call that bird a duck." Whatever defendants wish to call the President's action, it has every mark of a veto. The Line Item Veto Act states explicitly that "cancel" means "to rescind" or to render the provision as having no "legal force or effect." How a "canceled" provision

"remains on the books" and "remains valid" defies logic. The only way to restore these canceled provisions is for Congress to pass and present new bills according to the procedure prescribed in Article I. Clearly, this is an indication that the canceled law no longer exists. Therefore, despite Defendants' contentions, the Court finds that when the President canceled these provisions pursuant to his Line Item Veto authority, he unilaterally repealed duly enacted provisions and amended duly enacted laws, which Article I does not permit him to do.

Finally, Congress' "indirect attempt[] to accomplish what the Constitution prohibits . . . accomplishing directly" cannot stand. *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 829 (1995). "To argue otherwise is to suggest that the Farmers spent significant time and energy in debating and crafting Clauses that could be easily evaded." *Id.* at 831. Congress knew that a simple Line Item Veto, performed prior to the President's signature, would violate the Article I's requirement that the president sign or return the bills *in toto*. *See Line Item Veto: The President's Constitutional Authority, Hearing on S. Res. 195 Before the Subcomm. on the Constitution of the Comm. on the Judiciary*, 103d Cong. (1994). This limitation on the President has been clear since George Washington's tenure. *See* 33 *Writings of George Washington* 96 (John C. Fitzpatrick ed. 1940) ("From the nature of the Constitution, I must approve all the parts of a Bill, or reject it in toto.") Congress cannot evade this long-accepted requirement by merely changing the timing of the President's cancellation.

Because the Line Item Veto Act produced laws in violation of the requirement of bicameral passage, because it permitted the President unilaterally to repeal or amend duly enacted laws, and because it impermissibly attempts to evade the requirements that the President sign or reject a bill *in toto*, the Act violates the requirements of Article I. For that reason alone, the Line Item Veto Act is unconstitutional.

B. Separation of Powers

Furthermore, the Line Item Veto Act is unconstitutional because it impermissibly disrupts the balance of powers among the three branches of government.[14] The separation of powers into three coordinate branches is central to the principles on which this country was founded. *See, e.g., Mistretta v. United States*, 488 U.S. 361, 380 (1989). The declared purpose of separating and dividing the powers of government was to "diffuse power the better to secure liberty." *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 635 (1952). In writing about the principle of separated powers, Madison stated, "No political truth is certainly of greater intrinsic value or is stamped with the authority of more enlightened patrons of liberty." *The Federalist No. 47*, at 324 (J. Cooke ed. 1961). Madison later wrote, "But the great

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[14] While this analysis focuses on the balance of powers between the legislative and executive branches, the Line Item Veto could also affect judicial independence. It is possible that the President might use the Line Item Veto to manipulate the judiciary's budget, thus exerting pressure on its members. *See* Robert Destro, *Whom Do You Trust? Judicial Independence, the Power of the Purse & the Line Item Veto*, 44-Jan. Fed. Law. 26, 29 (1977).

security against a gradual concentration of the several powers in the same department, consists in giving to those who administer each department, the necessary constitutional means, and personal motives, to resist encroachments of the others." *The Federalist No. 51*, at 349 (J. Cooke ed. 1961). The Framers "regarded the checks and balances that they built into the tripartite Federal Government as a self-executing safeguard against the encroachment or aggrandizement of one branch at the expense of the other." *Buckley v. Valeo*, 424 U.S. at 122.

Pursuant to the doctrine of separate powers, certain functions are divided between the legislative and executive branches. Article I, section I vests all legislative authority in Congress. Legislative power is the authority to make laws. *Myers v. United States*, 272 U.S. 52 (1926). Executive powers, on the other hand, is to "take Care that the Laws be faithfully executed." U.S. Const., art. II, § 3. With regard to lawmaking, the President's function is strictly a negative one: to veto a bill in its entirety.

While it is Congress' duty to make laws, Congress can delegate certain rulemaking authority to other branches, as long as that delegation is appropriate to the duties of that branch. *See Mistretta*, 488 U.S. at 388. Congress may not, however, delegate its inherent lawmaking authority. *See, e.g., Loving v. United States*, 116 S.Ct. 1737, 1744 (1996) ("[T]he lawmaking function belongs to Congress . . . and may not be conveyed to another branch or entity."); *Field v. Clark*, 143 U.S. 649, 692 (1892) ("That Congress cannot delegate legislative power to the president is a principle universally recognized as vital to the integrity and maintenance of the system of government

ordained by the Constitution."); Edward Gibbon, *History of the Decline and Fall of the Roman Empire* 33 (1838) ("The principles of a free constitution are irrecoverably lost, when the legislative power is nominated by the executive."); Sir William Blackstone, 1 *Commentaries on the Law of England*, 146 (9th ed., reprinted 1978) (1783) ("In all tyrannical governments the supreme magistracy, or the right of both *making* and of *enforcing* the laws, is vested in one and the same man, or one and the same body of men; and wherever these two powers are united together, there can be no public liberty.").

The line between permissible delegations of rulemaking authority and impermissible abandonments of lawmaking power is a thin one. As one court described the distinction, "The legislature cannot delegate its power to make a law, but it can make a law to delegate a power to determine some fact or state of things upon which the law makes, or intends to make, its own action depend." *Field*, 143 U.S. at 694. Stated another way, "The true distinction . . . is between the delegation of power to make the law, which necessarily involves a discretion as to what it shall be, and conferring an authority or discretion as to its execution, to be exercised under and in pursuance of the law. The first cannot be done; to the latter no valid objection can be made." *Hampton v. United States*, 276 U.S. 394 (1928).

The Line Item Veto Act impermissibly crosses the line between acceptable delegations of rulemaking authority and unauthorized surrender to the President of an inherently legislative function, namely, the authority to permanently shape laws and package legislation. The Act enables the President, in his

discretion, to pick and choose among portions of an enacted law to determine which ones will remain valid. The Constitution, however, dictates that once a bill becomes law, the President's sole duty is to "take care that the laws be faithfully executed." His power cannot expand to that of "co-designer" of the law—that is Congress' domain. Any subsequent amendment of a statute falls under Congress' responsibility to legislate. The President cannot take this duty upon himself, nor can Congress relinquish that power to the Executive Branch.

The Defendants contend that the Line Item Veto is no different than the many delegations of legislative authority that Congress has made in the past. *See, e.g., Field v. Clark*, 143 U.S. 649. Unlike other delegations of Congressional authority, however, the Line Item Veto Act authorizes the President to permanently extinguish laws. These laws cannot be revived even if the President (or his successor) feels that they are needed. Further, the Line Item Veto Act empowers the President to make permanent changes to the text of the Internal Revenue Code, as he did in the Snake River case. Such delegations are unprecedented.

Defendants further urge the Court to find that the Line Item Veto provides the President with "intelligible standards" as required by the delegation doctrine. *See Mistretta*, 488 U.S. at 372. While it is true that the delegation doctrine has enjoyed a liberal reading in the last 60 years or so, *see, e.g., Federal Radio Comm'n v. Nelson Bros.*, 289 U.S. 266 (1933) (upholding a delegation based on "public convenience, interest or necessity"), by trying to bypass the maxim that Congress can delegate authority only if

that authority is, in fact, delegable, the Government attempts to "leap a chasm in two bounds." (Benjamin Disraeli, Earl of Beaconsfield.) It is irrelevant whether the Line Item Veto Act provides intelligible principles in its delegation of authority to the President because, as discussed above, the Act impermissibly attempts to transfer non-delegable legislative authority to the Executive Branch.

The separation of powers between the President and Congress is clear:

> In the framework of our Constitution, the President's power to see that the laws are faithfully executed refutes the idea that he is to be a lawmaker. The Constitution limits his functions in the lawmaking process to the recommending of laws he thinks wise and the vetoing of laws he thinks bad. And the Constitution is neither silent nor equivocal about who shall make laws which the President is to execute.

Youngstown, 343 U.S. at 587-88. By ceding inherently legislative authority to the President, the Line Item Veto Act violates this constitutional framework. For that reason, and for the reason that it violates the letter and spirit of the procedural requirements of Article I, the Line Item Veto Act is unconstitutional.

IV. Conclusion

Although the Line Item Veto Act may have presented an innovative and effective manner in which to control runaway spending by Congress, the Framers held loftier values. The *Chadha* Court recognized this tension between uncomplicated administration of government and the values honored in the Constitution:

> The choices we discern as having been made in the Constitutional convention impose burdens on governmental processes that often seem clumsy, inefficient, even unworkable, but those hard choices were consciously made by men who had lived under a form of government that permitted arbitrary governmental acts to go unchecked. There is no support in the Constitution or decisions of this court for the proposition that the cumbersomeness and delays often encountered in complying with explicit Constitutional standards may be avoided, either by the Congress or by the President. With all the obvious flaws of delay, untidiness, and potential for abuse, we have not yet found a better way to preserve freedom than by making the exercise of power subject to the carefully crafted restraints spelled out in the Constitution.

Chadha, 462 U.S. at 959. Because the Line Item Veto impermissibly violates the central tenets of our system of government, it cannot stand.

Therefore, because the Court finds that Plaintiffs have demonstrated the requisite injury to have standing and, furthermore, that the Line Item Veto Act violates the provisions of Article I, section 7 of the United States Constitution and the separation of powers doctrine, this Court declares that the Line Item Veto Act is unconstitutional. Accordingly, the Court will grant Plaintiffs' Motions for Summary

Judgment and deny Defendants' Motion to Dismiss and Motion for Summary Judgment. An Order will accompany this Opinion.

February 12th, 1998

/s/ THOMAS F. HOGAN
THOMAS F. HOGAN
United States District Judge

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civ. No. 97-2393 (TFH)

THE CITY OF NEW YORK,
ET. AL., PLAINTIFFS

v.

WILLIAM J. CLINTON,
ET. AL., DEFENDANTS

Civ. No. 97-2463 (TFH)

SNAKE RIVER POTATO GROWERS,
INC., ET. AL, PLAINTIFFS

v.

ROBERT E. RUBIN, DEFENDANT

[Filed Feb. 13, 1998]

NOTICE OF APPEAL

Pursuant to 2 U.S.C. § 692(b), William J. Clinton, President of the United States, Donna E. Shalala, Secretary of Health and Human Services, and Franklin D. Raines, Director, Office of Management and Budget, defendants in Civ. No. 97-2393 (TFH), and Robert E. Rubin, Secretary of the Treasury, defendant in Civ. No. 97-2463 (TFH), appeal to the United States Supreme Court from the Order issued by this Court on February 12, 1998.

Respectfully submitted,

FRANK W. HUNGER
Assistant Attorney General

ERIC H. HOLDER, JR.,
United States Attorney

GARY G. GRINDLER
Deputy Assistant Attorney General

DAVID J. ANDERSON

/s/ ADAM ISSENBERG
NEIL H. KOSLOWE
Special Litigation Counsel
D.C. Bar No. 361792
ADAM ISSENBERG
Trial Attorney
Civil Division - Room 1036
Department of Justice
P.O. Box 883
Washington, D.C. 20044
Telephone: (202) 514-3418

Attorneys for Defendants

Dated: February 13, 1998

APPENDIX C

STATUTORY PROVISIONS

§ 691. Line item veto authority

(a) In general

Notwithstanding the provisions of subchapters I and II of this chapter, and subject to the provisions of this subchapter, the President may, with respect to any bill or joint resolution that has been signed into law pursuant to Article I, section 7, of the Constitution of the United States, cancel in whole—

(1) any dollar amount of discretionary budget authority;

(2) any item of new direct spending; or

(3) any limited tax benefit;

if the President—

(A) determines that such cancellation will—

(i) reduce the Federal budget deficit;

(ii) not impair any essential Government functions; and

(iii) not harm the national interest; and

(B) notifies the Congress of such cancellation by transmitting a special message, in accordance with section 691a of this title, within five calendar days (excluding Sundays) after the enactment of the law providing the dollar amount of discretionary budget authority, item of new direct spending, or limited tax benefit that was canceled.

(b) Identification of cancellations

In identifying dollar amounts of discretionary budget authority, items of new direct spending, and limited tax benefits for cancellation, the President shall—

(1) consider the legislative history, construction, and purposes of the law which contains such dollar amounts, items, or benefits;

(2) consider any specific sources of information referenced in such law or, in the absence of specific sources of information, the best available information; and

(3) use the definitions contained in section 691e of this title in applying this subchapter to the specific provisions of such law.

(c) Exception for disapproval bills

The authority granted by subsection (a) of this section shall not apply to any dollar amount of discretionary budget authority, item of new direct spending, or limited tax benefit contained in any law that is a disapproval bill as defined in section 691e of this title.

§ 691a. Special messages

(a) In general

For each law from which a cancellation has been made under this subchapter, the President shall transmit a single special message to the Congress.

(b) Contents

(1) The special message shall specify—

(A) the dollar amount of discretionary budget authority, item of new direct spending, or limited tax benefit which has been canceled, and provide a corresponding reference number for each cancellation;

(B) the determinations required under section 691(a) of this title, together with any supporting material;

(C) the reasons for the cancellation;

(D) to the maximum extent practicable, the estimated fiscal, economic, and budgetary effect of the cancellation;

(E) all facts, circumstances and considerations relating to or bearing upon the cancellation, and to the maximum extent practicable, the estimated effect of the cancellation upon the objects, purposes and programs for which the canceled authority was provided; and

(F) include the adjustments that will be made pursuant to section 691c of this title to the discretionary spending limits under section 665 of this title and an evaluation of the effects of those adjustments upon the sequestration procedures of section 901 of this title.

(2) In the case of a cancellation of any dollar amount of discretionary budget authority or item of new direct spending, the special message shall also include, if applicable—

(A) any account, department, or establishment of the Government for which such budget authority was to have been available for obligation

and the specific project or governmental functions involved;

(B) the specific States and congressional districts, if any, affected by the cancellation; and

(C) the total number of cancellations imposed during the current session of Congress on States and congressional districts identified in subparagraph (B).

(c) Transmission of special messages to House and Senate

(1) The President shall transmit to the Congress each special message under this subchapter within five calendar days (excluding Sundays) after enactment of the law to which the cancellation applies. Each special message shall be transmitted to the House of Representatives and the Senate on the same calendar day. Such special message shall be delivered to the Clerk of the House of Representatives if the House is not in session, and to the Secretary of the Senate if the Senate is not in session.

(2) Any special message transmitted under this subchapter shall be printed in the first issue of the Federal Register published after such transmittal.

§ 691b. Cancellation effective unless disapproved

(a) In general

The cancellation of any dollar amount of discretionary budget authority, item of new direct spending, or limited tax benefit shall take effect upon receipt in the House of Representatives and the Senate of the special message notifying the Congress of the cancellation. If a disapproval bill for such special message is enacted into law, then all cancellations disapproved in

that law shall be null and void and any such dollar amount of discretionary budget authority, item of new direct spending, or limited tax benefit shall be effective as of the original date provided in the law to which the cancellation applied.

(b) Commensurate reductions in discretionary budget authority

Upon the cancellation of a dollar amount of discretionary budget authority under subsection (a) of this section, the total appropriation for each relevant account of which that dollar amount is a part shall be simultaneously reduced by the dollar amount of that cancellation.

§ 691c. Deficit reduction

(a) In general

(1) Discretionary budget authority

OMB shall, for each dollar amount of discretionary budget authority and for each item of new direct spending canceled from an appropriation law under section 691(a) of this title—

(A) reflect the reduction that results from such cancellation in the estimates required by section 251(a)(7) of the Balanced Budget and Emergency Deficit Control Act of 1985 [2 U.S.C. 901(a)(7)] in accordance with that Act [2 U.S.C. 900 et seq.], including an estimate of the reduction of the budget authority and the reduction in outlays flowing from such reduction of budget authority for each outyear; and

(B) include a reduction to the discretionary spending limits for budget authority and outlays in accordance with the Balanced Budget and

Emergency Deficit Control Act of 1985 [2 U.S.C. 900 et seq.] for each applicable fiscal year set forth in section 665(a)(2) of this title by amounts equal to the amounts for each fiscal year estimated pursuant to subparagraph (A).

(2) Direct spending and limited tax benefits

(A) OMB shall, for each item of new direct spending or limited tax benefit canceled from a law under section 691(a) of this title, estimate the deficit decrease caused by the cancellation of such item or benefit in that law and include such estimate as a separate entry in the report prepared pursuant to section 252(d) of the Balanced Budget and Emergency Deficit Control Act of 1985 [2 U.S.C. 902(d)].

(B) OMB shall not include any change in the deficit resulting from a cancellation of any item of new direct spending or limited tax benefit, or the enactment of a disapproval bill for any such cancellation, under this subchapter in the estimates and reports required by sections 252(b) and 254 of the Balanced Budget and Emergency Deficit Control Act of 1985 [2 U.S.C. 902(b) and 904].

(b) Adjustments to spending limits

After ten calendar days (excluding Sundays) after the expiration of the time period in section 691d(b)(1) of this title for expedited congressional consideration of a disapproval bill for a special message containing a cancellation of discretionary budget authority, OMB shall make the reduction included in subsection (a)(1)(B) of this section as part of the next sequester report required by section 254 of the Balanced Budget and Emergency Deficit Control Act of 1985 [2 U.S.C. 904].

(c) Exception

Subsection (b) of this section shall not apply to a cancellation if a disapproval bill or other law that disapproves that cancellation is enacted into law prior to 10 calendar days (excluding Sundays) after the expiration of the time period set forth in section 691d(b)(1) of this title.

(d) Congressional Budget Office estimates

As soon as practicable after the President makes a cancellation from a law under section 691(a) of this title, the Director of the Congressional Budget Office shall provide the Committees on the Budget of the House of Representatives and the Senate with an estimate of the reduction of the budget authority and the reduction in outlays flowing from such reduction of budget authority for each outyear.

§ 691d. Expedited congressional consideration of disapproval bills

(a) Receipt and referral of special message

Each special message transmitted under this subchapter shall be referred to the Committee on the Budget and the appropriate committee or committees of the Senate and the Committee on the Budget and the appropriate committee or committees of the House of Representatives. Each such message shall be printed as a document of the House of Representatives.

(b) Time period for expedited procedures

(1) There shall be a congressional review period of 30 calendar days of session, beginning on the first calendar day of session after the date on which the

special message is received in the House of Representatives and the Senate, during which the procedures contained in this section shall apply to both Houses of Congress.

(2) In the House of Representatives the procedures set forth in this section shall not apply after the end of the period described in paragraph (1).

(3) If Congress adjourns at the end of a Congress prior to the expiration of the period described in paragraph (1) and a disapproval bill was then pending in either House of Congress or a committee thereof (including a conference committee of the two Houses of Congress), or was pending before the President, a disapproval bill for the same special message may be introduced within the first five calendar days of session of the next Congress and shall be treated as a disapproval bill under this subchapter, and the time period described in paragraph (1) shall commence on the day of introduction of that disapproval bill.

(c) Introduction of disapproval bills

(1) In order for a disapproval bill to be considered under the procedures set forth in this section, the bill must meet the definition of a disapproval bill and must be introduced no later than the fifth calendar day of session following the beginning of the period described in subsection (b)(1) of this section.

(2) In the case of a disapproval bill introduced in the House of Representatives, such bill shall include in the first blank space referred to in section 691e(6)(C) of this title a list of the reference numbers for all cancellations made by the President in the special message to which such disapproval bill relates.

(d) Consideration in House of Representatives

(1) Any committee of the House of Representatives to which a disapproval bill is referred shall report it without amendment, and with or without recommendation, not later than the seventh calendar day of session after the date of its introduction. If any committee fails to report the bill within that period, it is in order to move that the House discharge the committee from further consideration of the bill, except that such a motion may not be made after the committee has reported a disapproval bill with respect to the same special message. A motion to discharge may be made only by a Member favoring the bill (but only at a time or place designated by the Speaker in the legislative schedule of the day after the calendar day on which the Member offering the motion announces to the House his intention to do so and the form of the motion). The motion is highly privileged. Debate thereon shall be limited to not more than one hour, the time to be divided in the House equally between a proponent and an opponent. The previous question shall be considered as ordered on the motion to its adoption without intervening motion. A motion to reconsider the vote by which the motion is agreed to or disagreed to shall not be in order.

(2) After a disapproval bill is reported or a committee has been discharged from further consideration, it is in order to move that the House resolve into the Committee of the Whole House on the State of the Union for consideration of the bill. If reported and the report has been available for at least one calendar day, all points of order against the bill and against consideration of the bill are waived. If discharged, all points of order against the bill and against consideration of the bill are waived. The motion is highly privileged. A motion to reconsider the vote by which the motion is agreed to or disagreed to shall not be in order. During consideration of the bill in the Committee of the Whole, the first reading of the bill shall be dispensed with. General debate shall proceed, shall be confined to the bill, and shall not exceed one hour equally divided and controlled by a proponent and an opponent of the bill. The bill shall be considered as read for amendment under the five-minute rule. Only one motion to rise shall be in order, except if offered by the manager. No amendment to the bill is in order, except any Member if supported by 49 other Members (a quorum being present) may offer an amendment striking the reference number or numbers of a cancellation or cancellations from the bill. Consideration of the bill for amendment shall not exceed one hour excluding time for recorded votes and quorum calls. No amendment shall be subject to further amendment, except pro forma amendments for the purposes of debate only. At the conclusion of the consideration of the bill for amendment, the Committee shall rise and report the bill to the House with such amendments as may have been adopted. The previous question shall be considered as ordered on the bill and amendments thereto to final passage without intervening motion. A motion to reconsider the vote on passage of the bill shall not be in order.

(3) Appeals from decisions of the Chair regarding application of the rules of the House of Representatives to the procedure relating to a disapproval bill shall be decided without debate.

(4) It shall not be in order to consider under this subsection more than one disapproval bill for the same

special message except for consideration of a similar Senate bill (unless the House has already rejected a disapproval bill for the same special message) or more than one motion to discharge described in paragraph (1) with respect to a disapproval bill for that special message.

(e) Consideration in Senate

(1) Referral and reporting

Any disapproval bill introduced in the Senate shall be referred to the appropriate committee or committees. A committee to which a disapproval bill has been referred shall report the bill not later than the seventh day of session following the date of introduction of that bill. If any committee fails to report the bill within that period, that committee shall be automatically discharged from further consideration of the bill and the bill shall be placed on the Calendar.

(2) Disapproval bill from House

When the Senate receives from the House of Representatives a disapproval bill, such bill shall not be referred to committee and shall be placed on the Calendar.

(3) Consideration of single disapproval bill

After the Senate has proceeded to the consideration of a disapproval bill for a special message, then no other disapproval bill originating in that same House relating to that same message shall be subject to the procedures set forth in this subsection.

(4) Amendments

(A) Amendments in order

The only amendments in order to a disapproval bill are—

(i) an amendment that strikes the reference number of a cancellation from the disapproval bill; and

(ii) an amendment that only inserts the reference number of a cancellation included in the special message to which the disapproval bill relates that is not already contained in such bill.

(B) Waiver or appeal

An affirmative vote of three-fifths of the Senators, duly chosen and sworn, shall be required in the Senate—

(i) to waive or suspend this paragraph; or

(ii) to sustain an appeal of the ruling of the Chair on a point of order raised under this paragraph.

(5) Motion nondebatable

A motion to proceed to consideration of a disapproval bill under this subsection shall not be debatable. It shall not be in order to move to reconsider the vote by which the motion to proceed was adopted or rejected, although subsequent motions to proceed may be made under this paragraph.

(6) Limit on consideration

(A) After no more than 10 hours of consideration of a disapproval bill, the Senate shall proceed, without

intervening action or debate (except as permitted under paragraph (9)), to vote on the final disposition thereof to the exclusion of all amendments not then pending and to the exclusion of all motions, except a motion to reconsider or to table.

(B) A single motion to extend the time for consideration under subparagraph (A) for no more than an additional five hours is in order prior to the expiration of such time and shall be decided without debate.

(C) The time for debate on the disapproval bill shall be equally divided between the Majority Leader and the Minority Leader or their designees.

(7) Debate on amendments

Debate on any amendment to a disapproval bill shall be limited to one hour, equally divided and controlled by the Senator proposing the amendment and the majority manager, unless the majority manager is in favor of the amendment, in which case the minority manager shall be in control of the time in opposition.

(8) No motion to recommit

A motion to recommit a disapproval bill shall not be in order.

(9) Disposition of Senate disapproval bill

If the Senate has read for the third time a disapproval bill that originated in the Senate, then it shall be in order at any time thereafter to move to proceed to the consideration of a disapproval bill for the same special message received from the House of Representatives and placed on the Calendar pursuant to paragraph (2), strike all after the enacting clause, substitute the text of the Senate disapproval bill, agree to the Senate amendment, and vote on final

disposition of the House disapproval bill, all without any intervening action or debate.

(10) Consideration of House message

Consideration in the Senate of all motions, amendments, or appeals necessary to dispose of a message from the House of Representatives on a disapproval bill shall be limited to not more than four hours. Debate on each motion or amendment shall be limited to 30 minutes. Debate on any appeal or point of order that is submitted in connection with the disposition of the House message shall be limited to 20 minutes. Any time for debate shall be equally divided and controlled by the proponent and the majority manager, unless the majority manager is a proponent of the motion, amendment, appeal, or point of order, in which case the minority manager shall be in control of the time in opposition.

(f) Consideration in conference

(1) Convening of conference

In the case of disagreement between the two Houses of Congress with respect to a disapproval bill passed by both Houses, conferees should be promptly appointed and a conference promptly convened, if necessary.

(2) House consideration

(A) Notwithstanding any other rule of the House of Representatives, it shall be in order to consider the report of a committee of conference relating to a disapproval bill provided such report has been available for one calendar day (excluding Saturdays, Sundays, or legal holidays, unless the House is in session

on such a day) and the accompanying statement shall have been filed in the House.

(B) Debate in the House of Representatives on the conference report and any amendments in disagreement on any disapproval bill shall each be limited to not more than one hour equally divided and controlled by a proponent and an opponent. A motion to further limit debate is not debatable. A motion to recommit the conference report is not in order, and it is not in order to move to reconsider the vote by which the conference report is agreed to or disagreed to.

(3) Senate consideration

Consideration in the Senate of the conference report and any amendments in disagreement on a disapproval bill shall be limited to not more than four hours equally divided and controlled by the Majority Leader and the Minority Leader or their designees. A motion to recommit the conference report is not in order.

(4) Limits on scope

(A) When a disagreement to an amendment in the nature of a substitute has been referred to a conference, the conferees shall report those cancellations that were included in both the bill and the amendment, and may report a cancellation included in either the bill or the amendment, but shall not include any other matter.

(B) When a disagreement on an amendment or amendments of one House to the disapproval bill of the other House has been referred to a committee of conference, the conferees shall report those cancellations upon which both Houses agree and may report

any or all of those cancellations upon which there is disagreement, but shall not include any other matter.

§ 691e. Definitions

As used in this subchapter:

(1) Appropriation law

The term "appropriation law" means an Act referred to in section 105 of title 1, including any general or special appropriation Act, or any Act making supplemental, deficiency, or continuing appropriations, that has been signed into law pursuant to Article I, section 7, of the Constitution of the United States.

(2) Calendar day

The term "calendar day" means a standard 24-hour period beginning at midnight.

(3) Calendar days of session

The term "calendar days of session" shall mean only those days on which both Houses of Congress are in session.

(4) Cancel

The term "cancel" or "cancellation" means—

(A) with respect to any dollar amount of discretionary budget authority, to rescind;

(B) with respect to any item of new direct spending—

(i) that is budget authority provided by law (other than an appropriation law), to prevent such budget authority from having legal force or effect;

(ii) that is entitlement authority, to prevent the specific legal obligation of the United States from having legal force or effect; or

(iii) through the food stamp program, to prevent the specific provision of law that results in an increase in budget authority or outlays for that program from having legal force or effect; and

(C) with respect to a limited tax benefit, to prevent the specific provision of law that provides such benefit from having legal force or effect.

(5) Direct spending

The term "direct spending" means—

(A) budget authority provided by law (other than an appropriation law);

(B) entitlement authority; and

(C) the food stamp program.

(6) Disapproval bill

The term "disapproval bill" means a bill or joint resolution which only disapproves one or more cancellations of dollar amounts of discretionary budget authority, items of new direct spending, or limited tax benefits in a special message transmitted by the President under this subchapter and—

(A) the title of which is as follows: "A bill disapproving the cancellations transmitted by the President on _____", the blank space being filled in with the date of transmission of the relevant special message and the public law number to which the message relates;

(B) which does not have a preamble; and

(C) which provides only the following after the enacting clause: "That Congress disapproves of cancellations _____", the blank space being filled in with a list by reference number of one or more cancellations contained in the President's special message, "as transmitted by the President in a special message on _____", the blank space being filled in with the appropriate date, "regarding _____.", the blank space being filled in with the public law number to which the special message relates.

(7) Dollar amount of discretionary budget authority

(A) Except as provided in subparagraph (B), the term "dollar amount of discretionary budget authority" means the entire dollar amount of budget authority—

(i) specified in an appropriation law, or the entire dollar amount of budget authority required to be allocated by a specific proviso in an appropriation law for which a specific dollar figure was not included;

(ii) represented separately in any table, chart, or explanatory text included in the statement of managers or the governing committee report accompanying such law;

(iii) required to be allocated for a specific program, project, or activity in a law (other than an appropriation law) that mandates the expenditure of budget authority from accounts, programs, projects, or activities for which budget authority is provided in an appropriation law;

(iv) represented by the product of the estimated procurement cost and the total quantity of items specified in an appropriation law or included in the statement of managers or the governing committee report accompanying such law; or

(v) represented by the product of the estimated procurement cost and the total quantity of items required to be provided in a law (other than an appropriation law) that mandates the expenditure of budget authority from accounts, programs, projects, or activities for which budget authority is provided in an appropriation law.

(B) The term "dollar amount of discretionary budget authority" does not include—

(i) direct spending;

(ii) budget authority in an appropriation law which funds direct spending provided for in other law;

(iii) any existing budget authority rescinded or canceled in an appropriation law; or

(iv) any restriction, condition, or limitation in an appropriation law or the accompanying statement of managers or committee reports on the expenditure of budget authority for an account, program, project, or activity, or on activities involving such expenditure.

(8) Item of new direct spending

The term "item of new direct spending" means any specific provision of law that is estimated to result in an increase in budget authority or outlays for direct spending relative to the most recent levels calculated pursuant to section 907 of this title.

(9) Limited tax benefit

(A) The term "limited tax benefit" means—

(i) any revenue-losing provision which provides a Federal tax deduction, credit, exclusion, or preference to 100 or fewer beneficiaries under title 26 in any fiscal year for which the provision is in effect; and

(ii) any Federal tax provision which provides temporary or permanent transitional relief for 10 or fewer beneficiaries in any fiscal year from a change to title 26.

(B) A provision shall not be treated as described in subparagraph (A)(i) if the effect of that provision is that—

(i) all persons in the same industry or engaged in the same type of activity receive the same treatment;

(ii) all persons owning the same type of property, or issuing the same type of investment, receive the same treatment; or

(iii) any difference in the treatment of persons is based solely on—

(I) in the case of businesses and associations, the size or form of the business or association involved;

(II) in the case of individuals, general demographic conditions, such as income, marital status, number of dependents, or tax return filing status;

(III) the amount involved; or

(IV) a generally-available election under title 26.

(C) A provision shall not be treated as described in subparagraph (A)(ii) if—

(i) it provides for the retention of prior law with respect to all binding contracts or other legally enforceable obligations in existence on a date contemporaneous with congressional action specifying such date; or

(ii) it is a technical correction to previously enacted legislation that is estimated to have no revenue effect.

(D) For purposes of subparagraph (A)—

(i) all businesses and associations which are related within the meaning of sections 707(b) and 1563(a) of title 26 shall be treated as a single beneficiary;

(ii) all qualified plans of an employer shall be treated as a single beneficiary;

(iii) all holders of the same bond issue shall be treated as a single beneficiary; and

(iv) if a corporation, partnership, association, trust or estate is the beneficiary of a provision, the shareholders of the corporation, the partners of the partnership, the members of the association, or the beneficiaries of the trust or estate shall not also be treated as beneficiaries of such provision.

(E) For purposes of this paragraph, the term "revenue-losing provision" means any provision which results in a reduction in Federal tax revenues for any one of the two following periods—

(i) the first fiscal year for which the provision is effective; or

(ii) the period of the 5 fiscal years beginning with the first fiscal year for which the provision is effective.

(F) The terms used in this paragraph shall have the same meaning as those terms have generally in title 26, unless otherwise expressly provided.

(10) OMB

The term "OMB" means the Director of the Office of Management and Budget

§ 691f. Identification of limited tax benefits

(a) Statement by Joint Tax Committee

The Joint Committee on Taxation shall review any revenue or reconciliation bill or joint resolution which includes any amendment to title 26 that is being prepared for filing by a committee of conference of the two Houses, and shall identify whether such bill or joint resolution contains any limited tax benefits. The Joint Committee on Taxation shall provide to the committee of conference a statement identifying any such limited tax benefits or declaring that the bill or joint resolution does not contain any limited tax benefits. Any such statement shall be made available to any Member of Congress by the Joint Committee on Taxation immediately upon request.

(b) Statement included in legislation

(1) Notwithstanding any other rule of the House of Representatives or any rule or precedent of the Senate, any revenue or reconciliation bill or joint

resolution which includes any amendment to title 26 reported by a committee of conference of the two Houses may include, as a separate section of such bill or joint resolution, the information contained in the statement of the Joint Committee on Taxation, but only in the manner set forth in paragraph (2).

(2) The separate section permitted under paragraph (1) shall read as follows: "Section 1021(a)(3) of the Congressional Budget and Impoundment Control Act of 1974 shall _____ apply to _____.", with the blank spaces being filled in with—

(A) in any case in which the Joint Committee on Taxation identifies limited tax benefits in the statement required under subsection (a) of this section, the word "only" in the first blank space and a list of all of the specific provisions of the bill or joint resolution identified by the Joint Committee on Taxation in such statement in the second blank space; or

(B) in any case in which the Joint Committee on Taxation declares that there are no limited tax benefits in the statement required under subsection (a) of this section, the word "not" in the first blank space and the phrase "any provision of this Act" in the second blank space.

(c) President's authority

If any revenue or reconciliation bill or joint resolution is signed into law pursuant to Article I, section 7, of the Constitution of the United States—

(1) with a separate section described in subsection (b)(2) of this section, then the President may use the authority granted in section 691(a)(3) of this title only to cancel any limited tax benefit in that law, if any, identified in such separate section; or

(2) without a separate section described in subsection (b)(2) of this section, then the President may use the authority granted in section 691(a)(3) of this title to cancel any limited tax benefit in that law that meets the definition in section 691e of this title.

(d) Congressional identifications of limited tax benefits

There shall be no judicial review of the congressional identification under subsections (a) and (b) of this section of a limited tax benefit in a conference report.

§ 692. Judicial review

(a) Expedited review

(1) Any Member of Congress or any individual adversely affected by part C of title X of the Congressional Budget and Impoundment Control Act of 1974 [2 U.S.C. 691 *et seq.*] may bring an action, in the United States District Court for the District of Columbia, for declaratory judgment and injunctive relief on the ground that any provision of this part violates the Constitution.

(2) A copy of any complaint in an action brought under paragraph (1) shall be promptly delivered to the Secretary of the Senate and the Clerk of the House of Representatives, and each House of Congress shall have the right to intervene in such action.

(3) Nothing in this section or in any other law shall infringe upon the right of the House of Representatives to intervene in an action brought under

paragraph (1) without the necessity of adopting a resolution to authorize such intervention.

(b) Appeal to Supreme Court

Notwithstanding any other provision of law, any order of the United States District Court for the District of Columbia which is issued pursuant to an action brought under paragraph (1) of subsection (a) of this section shall be reviewable by appeal directly to the Supreme Court of the United States. Any such appeal shall be taken by a notice of appeal filed within 10 calendar days after such order is entered; and the jurisdictional statement shall be filed within 30 calendar days after such order is entered. No stay of an order issued pursuant to an action brought under paragraph (1) of subsection (a) of this section shall be issued by a single Justice of the Supreme Court.

(c) Expedited consideration

It shall be the duty of the District Court for the District of Columbia and the Supreme Court of the United States to advance on the docket and to expedite to the greatest possible extent the disposition of any matter brought under subsection (a) of this section.

APPENDIX D

62 Fed. Reg. 43262:

NOTICES

OFFICE OF MANAGEMENT AND BUDGET

Cancellation Pursuant to Line Item Veto Act;
Balanced Budget Act of 1997

Tuesday, August 12, 1997

August 11, 1997.

Dear Mr. President: In accordance with the Line Item Veto Act, I hereby cancel one item of new direct spending, as specified in the attached report, contained in the "Balanced Budget Act of 1997" (Public Law 105-33; H.R. 2015). I have determined that this cancellation will reduce the Federal budget deficit, will not impair any essential Government functions, and will not harm the national interest. This letter, together with its attachment, constitutes a special message under section 1022 of the Congressional Budget and Impoundment Control Act of 1974, as amended.

Sincerely,

William J. Clinton.

The Honorable Albert Gore, Jr.,
President of the Senate,
Washington, D.C. 20510.

August 11, 1997

Dear Mr. Speaker: In accordance with the Line Item Veto Act, I hereby cancel one item of new direct spending, as specified in the attached report, contained in the "Balanced Budget Act of 1997" (Public Law 105-33; H.R. 2015). I have determined that this cancellation will reduce the Federal budget deficit, will not impair any essential Government functions, and will not harm the national interest. This letter, together with its attachment, constitutes a special message under section 1022 of the Congressional Budget and Impoundment Control Act of 1974, as amended.

Sincerely,

William J. Clinton.

The Honorable Newt Gingrich,
Speaker of the House of Representatives,
Washington, D.C. 20515.

Cancellation No. 97-3

CANCELLATION OF ITEM OF NEW DIRECT SPENDING

Report Pursuant to the Line Item Veto Act, P.L. 104-130

Bill Citation: "Balanced Budget Act of 1997" (H.R. 2015)

1(A). Limited of New Direct Spending: Section 4722(c). Subsection(c), "Waiver of Certain Provider Tax Provisions", of Section 4722, "Treatment of State Texas Imposed on Certain Hospitals", is canceled in its entirety. The remainder of Section 4722 is not canceled.

1(B). Determinations: This cancellation will reduce the Federal budget deficit, will not impair any essential Government functions, and will not harm the national interest.

1(C), (E). Reasons for Cancellation; Facts, Circumstances, and Considerations Relating to or Bearing upon the Cancellation; and Estimated Effect of Cancellation on Objects, Purposes, and Programs: In the past, Federal Medicaid spending increased dramatically because some States used disproportionate share hospital payments and related special financing mechanisms such as levying taxes on health care providers to effectively lower their share of Medicaid spending. Lowering a State's share of Medicaid spending allows the State to generate additional revenues that can potentially be used for non-Medicaid purposes. In 1991, Congress limited the

growth in Medicaid spending by enacting legislation to restrict the ability of States to use certain types of provider taxes as their share of Medicaid spending. *See* Section 1903(w) of the Social Security Act, 42 U.S.C. 1296b(w). Congress required that provider taxes be uniform and broad-based in order to qualify as a State's "matching" funds. The canceled item would have deemed taxes, fees, or assessments that were collected by the State of New York from a health care provider before June 1, 1997, and for which a waiver has been applied for, to be permissible health care related taxes in compliance with the requirements of Medicaid law. The canceled item, which would have constituted new direct spending, would have given preferential treatment to only one State (New York), by allowing that State to continue relying upon impermissible provider taxes to finance its Medicaid program. This preferential treatment would have increased Medicaid costs, would have treated New York differently from all other States, and would have established a costly precedent for other States to request comparable treatment. The legislative history and purposes of this provision were considered, but did not outweigh the foregoing reasons for cancellation.

1(D). Estimated Fiscal, Economic, and Budgetary Effect of Cancellation: As a result of the cancellation, Federal outlays will not increase, as specified below. This will have a commensurate effect on the Federal budget deficit and, to that extent, will have a beneficial effect on the economy.

62 Fed. Reg. 43262-01:

Cancellation No. 97-3 (p.2)

Outlay Changes (in billions of dollars)[1]

FY 1998	FY 1999	FY 2000	FY2001	FY-2202	Total
-$0.2	0	0	0	0	$0.2

1(F). Adjustments to Discretionary Spending Limits: Not Applicable

2(A). Agency: Department of Health and Human Services
2(A). Bureau: Health Care Financing Administration
2(A). Governmental Function (Account):
Medicaid (Grants to States for Medicaid)

2(B). States and Congressional Districts Affected:
New York and all Congressional Districts in New York.
2(C). Total Number of Cancellations (inclusive) in current Sesions in each State and District identified above:
One

---

[1] Based on CBO estimates. Final Administration scoring may vary.

62 Fed. Reg. 43265:

NOTICES

OFFICE OF MANAGEMENT AND BUDGET

Cancellation Pursuant to Line Item Veto Act;
Taxpayer Relief Act of 1997

Tuesday, August 12, 1997

August 11, 1997.

Dear Mr. President: In accordance with the Line Item Veto Act, I hereby cancel two limited tax benefits, as specified in the attached reports, contained in the "Taxpayer Relief Act of 1997" (Public Law 105-34; H.R. 2014). I have determined that each of these cancellations will reduce the Federal budget deficit, will not impair any essential Government functions, and will not harm the national interest. This letter, together with its attachments, constitutes a special message under section 1022 of the Congressional Budget and Impoundment Control Act of 1974, as amended.

Sincerely,

William J. Clinton.

The Honorable Albert Gore, Jr.,
President of the Senate,
Washington, D.C. 20510.

August 11, 1997

Dear Mr. Speaker: In accordance with the Line Item Veto Act, I hereby cancel two limited tax benefits, as specified in the attached reports, contained in the "Taxpayer Relief Act of 1997" (Public Law 105-34; H.R. 2014). I have determined that each of these cancellations will reduce the Federal budget deficit, will not impair any essential Government functions, and will not harm the national interest. This letter, together with its attachments, constitutes a special message under section 1022 of the Congressional Budget and Impoundment Control Act of 1974, as amended.

Sincerely,

William J. Clinton.

The Honorable Newt Gingrich,
Speaker of the House of Representatives,
Washington, D.C. 20515.

Cancellation No. 97-1

CANCELLATION OF LIMITED TAX BENEFIT

Report Pursuant to the Line Item Veto Act, P.L. 104-130

Bill Citation: "Taxpayer Relief Act of 1997" (H.R. 2014)

1(A). Limited Tax Benefit: Section 1175. This item is identified as a limited tax benefit at Section 1701(54) of the bill. Section 1175, "Exemption for Active Financing Income", is canceled in its entirety.

1(B). Determinations: This cancellation will reduce the Federal budget deficit, will not impair any essential Government functions, and will not harm the national interest.

1(C), (E). Reasons for Cancellation; Facts, Circumstances, and Considerations Relating to or Bearing upon the Cancellation; and Estimated Effect of Cancellation on Objects, Purposes, and Programs: Prior to 1987, income earned in connection with the active conduct of foreign financial services businesses, including interest, dividends and certain gains, generally was exempt from current U.S. tax. However, the Tax Reform Act of 1986 eliminated or curtailed this benefit based on serious concerns regarding the mobility of such income and the case with which financial services entities could shift income to tax-haven jurisdictions. *See* P.L. 99-514, section 1221(a)(1). The canceled item would have enacted a new exemption for such income for a single year (1998), and would have addressed adequately the concerns that led to the repeal of the prior exemption in 1986. The one-year restoration of an exemption for this income would have decreased Federal receipts, would have allowed the tax-haven abuses that previously existed, and would have provided preferential tax treatment to a limited group of taxpayers. The legislative history and purposes of this provision were considered, but did not outweigh the foregoing reasons for cancellation.

1(D). Estimated Fiscal, Budgetary, and Economic Effect of Cancellation: As a result of the cancellation, Federal receipts will not decrease by an estimated $317 million over 5 years. This will have a commensurate effect on the Federal budget deficit and, to that extent, will have a beneficial effect on the economy.

1(F). Adjustments to Discretionary Spending Limits: Not applicable.

Cancellation No. 97-2

CANCELLATION OF LIMITED TAX BENEFIT

Report Pursuant to the Line Item Veto Act, P.L. 104-130

Bill Citation: "Taxpayer Relief Act of 1997" (H.R. 2014)

1(A). Limited Tax Benefit. Section 968. This item is identified as a limited tax benefit at Section 1701(30) of the bill. Section 968, "Nonrecognition of Gain on Sale of Stock to Certain Farmers' Cooperatives", is canceled in its entirety.

1(B). Determinations: This cancellation will reduce the Federal budget deficit, will not impair any essential Government functions, and will not harm the national interest.

1(C), (E). Reasons for Cancellation; Facts, Circumstances, and Considerations Relating to or Bearing upon the Cancellation; and Estimated Effect of Cancellation on Objects, Purposes, and Program: The canceled item would have allowed deferral of gain recognition on the sale of certain corporate stock of farm-product refiners and processors to an eligible farmers' cooperative, thereby providing an exception to the general rule that gain is recognized when stock is sold. Under current law, gain deferral is permitted on the sale of qualified securities of a corporation to an employee stock ownership plan (ESOP) or an eligible worker-owned cooperative; however, these provisions of current law contain appropriate restrictions that would not have applied to transactions

covered by the canceled item, notably restrictions that the seller's stock must not be traded on a securities market and that the seller must not be a corporation. While the Administration wants to encourage value-added farming through the purchase by farmers' cooperatives of refiners or processors of agricultural goods, the cancellation of this provision is nonetheless compelled by two narrow but important considerations. First, the canceled item would have created opportunities for complete avoidance of tax on the gain from a sale of a refiner or processor because it lacks the safeguards that apply to sales of stock to ESOPs. Second, this provision failed to target its benefits to small-and-medium-size cooperatives. The canceled item would not have benefitted farmers generally would have decreased Federal receipts, would have created opportunities for abusive tax planning, and would have provided preferential tax treatment to a limited group of taxpayers. The legislative history and purposes of this provision were considered, but did not outweigh the foregoing reasons for cancellation.

1(D). Estimated Fiscal, Budgetary, and Economic Effect of Cancellation: As a result of the cancellation, Federal receipts will not decrease by an estimated $98 million over 5 years and $155 million over 10 years. This will have a commensurate effect on the Federal budget deficit and, to that extent, will have a beneficial effect on the economy.

1(F). Adjustments to Discretionary Spending Limits: Not applicable.

APPENDIX E

1. Section 4722(c) of the Balanced Budget Act of 1997, Pub. L. No. 105-33, 111 Stat. 515, provides as follows:

WAIVER OF CERTAIN PROVIDER TAX PROVISIONS.—Notwithstanding any other provision of law, taxes, fees, or assessments, as defined in section 1903(w)(3)(A) of the Social Security Act (42 U.S.C. 1396b(w)(3)(A), that were collected by the State of New York from a health care provider before June 1, 1997, and for which a waiver of the provisions of subparagraph (B) or (C) of section 1903(w)(3) of such Act has been applied for, or that would, but for this subsection require that such waiver be applied for, in accordance with subparagraph (E) of such section, and, (if so applied for) upon which action by the Secretary of Health and Human Services (including any judicial review of any such proceeding) has not been completed as of July 23, 1997, are deemed to be permissible health care related taxes and in compliance with the requirements of subparagraphs (B) and (C) of section 1903(w)(3) of such Act.

2. Section 968 of the Taxpayer Relief Act of 1997, Pub. L. No. 105-34, 111 Stat. 895-896, provides as follows:

NONRECOGNITION OF GAIN ON SALE OF STOCK TO CERTAIN FARMERS' COOPERATIVES/

(a) IN GENERAL.—Section 1042 (relating to sales of stock to employee stock ownership plans or

certain cooperatives) is amended by adding at the end the following new subsection:

"(g) APPLICATION OF SECTION TO SALES OF STOCK IN AGRICULTURAL REFINERS AND PROCESSORS TO ELIGIBLE FARM COOPERATIVES.—

"(1) IN GENERAL.—This section shall apply to the sale of stock of a qualified refiner or processor to an eligible farmers' cooperative.

"(2) QUALIFIED REFINER OR PROCESSOR.—For purposes of this subsection, the term 'qualified refiner or processor' means a domestic corporation—

"(A) substantially all of the activities of which consist of the active conduct of the trade or business of refining or processing agricultural or horticultural products, and

"(B) which, during the 1-year period ending on the date of the sale, purchases more than one-half of such products to be refined or processed from—

"(i) farmers who make up the eligible farmers' cooperative which is purchasing stock in the corporation in a transaction to which this subsection is to apply, or

"(ii) such cooperative.

"(3) ELIGIBLE FARMERS' COOPERATIVE.—For purposes of this section, the term 'eligible farmers' cooperative' means an organization to which part I of subchapter T applies and which is engaged in the marketing of agricultural or horticultural products.

"(4) SPECIAL RULES.—In applying this section to a sale to which paragraph (1) applies—

"(A) the eligible farmers' cooperative shall be treated in the same manner as a cooperative described in subsection (b)(1)(B),

"(B) subsection (b)(2) shall be applied by substituting '100 percent' for '30 percent' each place it appears,

"(C) the determination as to whether any stock in the domestic corporation is a qualified security shall be made without regard to whether the stock is an employer security or to subsection (c)(1)(A), and

"(D) paragraphs (2)(D) and (7) of subsection (c) shall not apply."

(b) EFFECTIVE DATE.—The amendment made by this section shall apply to sales after December 31, 1997.

Supreme Court, U.S.
FILED
FEB 24 1998
CLERK

No. 97-1374

IN THE
Supreme Court of the United States
OCTOBER TERM, 1997

WILLIAM J. CLINTON, *et al.*,
Appellants,
v.
CITY OF NEW YORK, *et al.*,
Appellees.

ROBERT E. RUBIN,
Appellant,
v.
SNAKE RIVER POTATO GROWERS, INC., *et al.*,
Appellees.

On Appeal from the United States District Court for the District of Columbia

MEMORANDUM OF APPELLEES SNAKE RIVER POTATO GROWERS, INC., ET AL. IN RESPONSE TO JURISDICTIONAL STATEMENT

DONALD B. HOLBROOK
RANDON W. WILSON
WILLIAM H. ORTON
JONES, WALDO, HOLBROOK & MCDONOUGH
170 South Main Street
Salt Lake, UT 84101
(801) 328-0537

LLOYD N. CUTLER
LOUIS R. COHEN
Counsel of Record
LAWRENCE A. KASTEN
WILMER, CUTLER & PICKERING
2445 M Street, N.W.
Washington, D.C. 20037
(202) 663-6000

February 24, 1998

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

QUESTIONS PRESENTED

Appellees agree with the statement of the Questions Presented made by appellants.

PARTIES TO THE PROCEEDINGS

Appellees agree with the statement of the Parties to the Proceedings made by appellants.

RULE 29.6 LISTING

Appellee Snake River Potato Growers, Inc. is a non-profit agricultural cooperative association incorporated under the laws of Idaho. It has no parent companies or subsidiaries.

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IN THE

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On Appeal from the United States District Court for the District of Columbia

---

MEMORANDUM OF APPELLEES SNAKE RIVER POTATO GROWERS, INC., ET AL. IN RESPONSE TO JURISDICTIONAL STATEMENT

ARGUMENT

Appellees Snake River Potato Growers, Inc., et al. agree that the Court should note probable jurisdiction in this case, which presents issues of substantial public importance. Appellees have also joined the Solicitor General in moving the Court to set an expedited schedule for briefing and argument.

The *Snake River* case arose from the President's cancellation of Section 968 of the Taxpayer Relief Act of

1997, Pub. L. No. 105-34, 111 Stat. 788, 895-96. The *Snake River* appellees wish to note two points in response to the Jurisdictional Statement:

1. The *Snake River* appellees are not, as the Jurisdictional Statement implies, mere incidental, or secondary, or self-imagined beneficiaries of Section 968. On the contrary, the congressional sponsors and the President both stated that the purpose of Section 968 was to help farm cooperatives buy crop refining and processing facilities, and both made clear their belief that the section would do so.[1] Appellee Snake River Potato Growers is a farm cooperative formed in 1997, by appellee Cranney and others, for the specific purpose of making facilities purchases of the kind Section 968 was designed to assist, and it was actively engaged in negotiating the first such purchase when the President canceled Section 968.

2. The jurisdictional statement, which focuses on the history of government-spending laws, fails to describe what happened, in a jurisprudential sense, when the President canceled Section 968. Section 968 purportedly added a new section, Section 1042(g), to the Internal Revenue Code of 1986, affecting private rights by altering the tax

[1] *See, e.g., Dear Colleague Letter of Reps. Roberts and Stenholm* (Dec. 1, 1995) (Appendix to Memorandum of Plaintiffs Snake River Potato Growers, Inc., et al. In Support of Motion for Summary Judgment and in Opposition to Defendant's Motion to Dismiss ("Snake River App." at Tab 5). President Clinton, in his cancellation message, stated that Section 968 was designed to "encourage value-added farming through the purchase by farmers' cooperatives of refiners or processors of agricultural goods. . . ." Cancellation No. 97-2, 62 Fed. Reg. 43,267, at ¶ 1(C), (E) (J.S. App. 70a-71a). Appellant Rubin agreed. *See Transcript of Press Briefing by Treasury Secretary Bob Rubin, OMB Director Frank Raines, Director, National Economic Council Gene Sperling*, The White House, Office of the Press Secretary (Aug. 11, 1997), at 6 (Snake River App. at Tab 19). As the district court concluded, "[t]he express purpose of section 968 was to help farmers to buy refining and processing facilities by eliminating a tax obstacle facing sellers who sell to them." (J.S. App. 17a, n.10.)

treatment of certain transactions. The President's cancellation of Section 968 permanently removed Section 1042(g) from the Code, as completely as if Section 968 had never been enacted or had been repealed in the manner prescribed by Article I of the Constitution. The issues on the merits in the *Snake River* case are not related to the history of delegated discretionary power over spending or other government activities.

CONCLUSION

The Court should note probable jurisdiction.

Respectfully submitted,

DONALD B. HOLBROOK
RANDON W. WILSON
WILLIAM H. ORTON
JONES, WALDO, HOLBROOK
& MCDONOUGH
170 South Main Street
Salt Lake, UT 84101
(801) 328-0537

LLOYD N. CUTLER
LOUIS R. COHEN
Counsel of Record
LAWRENCE A. KASTEN
WILMER, CUTLER
& PICKERING
2445 M Street, N.W.
Washington, D.C. 20037
(202) 663-6000

February 24, 1998

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No. 97-1374

In The

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October Term, 1997

WILLIAM J. CLINTON, ET AL.,

Appellants,

v.

CITY OF NEW YORK, ET AL.,

Appellees.

On Appeal From The United States District Court
For The District Of Columbia

MEMORANDUM IN RESPONSE TO JURISDICTIONAL STATEMENT

CHARLES J. COOPER
DAVID H. THOMPSON
COOPER, CARVIN & ROSENTHAL, PLLC
2000 K Street, N.W.,
Suite 401
Washington, D.C. 20006
(202) 822-8950

M. SEAN LAANE
ARNOLD & PORTER
555 12th Street, N.W.
Washington, D.C. 20004
(202) 942-5000

JEFFREY D. FRIEDLANDER
Acting Corporation
Counsel of the City
of New York

LEONARD J. KOERNER*
ALAN G. KRAMS
DAVID B. GOLDIN
Assistant Corporation
Counsels
City of New York
Corporation Counsel
New York City
Law Department
100 Church Street,
Room 6-168
New York, NY 10007
(212) 788-1010

**Counsel of Record*

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

Richard Ferreri
General Counsel
District 37, American
Federation of State,
County & Municipal
Employees
125 Barclay Street
New York, NY 10007
(212) 815-1450

Peter F. Nadel
Rosenman & Colin, LLP
575 Madison Avenue
New York, NY 10022
(212) 940-7010

Basil Patterson
Meyer, Suozzi, English
& Klein, P.C.
Counsel for Local 1199,
National Health and
Human Service
Employees Union
1505 Kellum Place
Mineola, NY 11501
(516) 741-6565

QUESTIONS PRESENTED

Appellees agree with the statement of the Questions Presented made by appellants.

PARTIES TO THE PROCEEDINGS

Appellees agree with the statement of the Parties to the Proceedings made by appellants.

RULE 29.6 STATEMENT

The New York City Health and Hospitals Corporation has no parent company or nonwholly owned subsidiaries. Greater New York Hospital Association has no parent company. Greater New York Hospital Association has an ownership interest in the following nonwholly owned subsidiaries: AmDec, LLC; PIX, LLC; and The Health Information Network Connection, LLC. The parent company of Jamaica Hospital Medical Center is MediSys Health Network, Inc. The sole nonwholly owned subsidiary of Jamaica Hospital Medical Center is Neighborhood Health Providers, LLC.

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Pub. L. No. 105-33, § 4722(c), 111 Stat. 515 .....1, 2

MEMORANDUM IN RESPONSE TO JURISDICTIONAL STATEMENT

ARGUMENT

Appellees agree that the Court should note probable jurisdiction in this case. Although the district court's decision holding the Line Item Veto Act ("Act") unconstitutional is correct, the issue is one of substantial public importance, and the Act itself places this case within the Court's mandatory appellate jurisdiction. 2 U.S.C. § 692(b). Indeed, the Court heard argument on the constitutionality of the Act last Term in *Raines v. Byrd*, ___ U.S. ___, 117 S.Ct. 2312 (1997), but held that the congressional plaintiffs in that case lacked standing to raise the issue. Accordingly, no purpose would be served by a lengthy response here to all of the arguments advanced by appellants. Nevertheless, appellees do wish to address briefly appellants' contention that this case, like *Raines*, does not satisfy the standing requirements of Article III.

The district court correctly concluded that appellee healthcare providers "suffered an immediate, concrete injury the moment that the President used the Line Item Veto to cancel section 4722(c) and deprived them of the benefits of the law." J.S. 13a.[1] Prior to the enactment of section 4722(c), the Health Care Financing Administration of the Department of Health and Human Services ("HCFA") determined that certain of New York State's healthcare provider taxes were not "broad-based" and

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[1] The district court considered the standing only of the appellee healthcare providers and did not address the standing of the other plaintiffs in this suit. J.S. 13a, n.8, citing *Bowsher v. Synar*, 478 U.S. 714, 721 (1986).

"uniform" and thus prevented a like amount of healthcare expenditures from qualifying for federal Medicaid matching funds. As a consequence, the State would have been obligated to repay these funds to the federal government unless HCFA granted New York State a waiver. By operation of state law, this liability would automatically have been passed on to appellee healthcare providers. Section 4722(c) effectively granted the State a *statutory* waiver and thus protected appellees from any liability for the repayment of matching funds. As the district court concluded, "[t]his protection constituted a benefit to Plaintiffs. When the President canceled section 4722(c), Plaintiffs were divested of the benefit conferred upon them by the legislation." J.S. 13a. Deprivation of such a benefit plainly satisfies the injury requirement of Article III.

Nevertheless, appellants contend that appellees' injury lacks a sufficient "causal nexus" to the President's cancellation. J.S. 21. Specifically, appellants posit that appellees' injury "would depend upon the decision of state officials to seek recoupment under New York law." J.S. 20. Yet, as noted above, the "decision" to impose this liability on appellees has already been made by the New York Legislature. Appellees will automatically be subject to liability by operation of state law, without regard to any decision of a state official, if the State is required to repay its matching funds. To be sure, it is possible that the New York Legislature could render this case moot by repealing its laws and thus removing the injury visited upon appellees by the President's cancellation. But this possibility, which is present in almost every case, has no bearing on the question of standing.

CONCLUSION

The Court should note probable jurisdiction.

Respectfully submitted,

CHARLES J. COOPER
DAVID H. THOMPSON
COOPER, CARVIN & ROSENTHAL, PLLC
2000 K Street, N.W., Suite 401
Washington, D.C. 20006
(202) 822-8950

M. SEAN LAANE
ARNOLD & PORTER
555 12th Street, N.W.
Washington, D.C. 20004
(202) 942-5000

PETER F. NADEL
ROSENMAN & COLIN, LLP
575 Madison Avenue
New York, NY 10022
(212) 940-7010

JEFFREY D. FRIEDLANDER
Acting Corporation Counsel of the City of New York

LEONARD J. KOERNER*
ALAN G. KRAMS
DAVID B. GOLDIN
Assistant Corporation Counsels
City of New York
Corporation Counsel
New York City Law Department
100 Church Street, Room 6-168
New York, NY 10007
(212) 788-1010

**Counsel of Record*

RICHARD FERRERI
General Counsel
District 37, American
Federation of State,
County & Municipal
Employees
125 Barclay Street
New York, NY 10007
(212) 815-1450

BASIL PATTERSON
MEYER, SUOZZI, ENGLISH
& KLEIN, P.C.
Counsel for Local 1199,
National Health and
Human Service
Employees Union
1505 Kellum Place
Mineola, NY 11501
(516) 741-6565

5

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In the Supreme Court of the United States

OCTOBER TERM, 1997

WILLIAM J. CLINTON, ET AL., APPELLANTS

v.

CITY OF NEW YORK, ET AL.

ROBERT E. RUBIN, APPELLANT

v.

SNAKE RIVER POTATO GROWERS, INC., ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

BRIEF FOR THE APPELLANTS

SETH P. WAXMAN
Solicitor General
FRANK W. HUNGER
Assistant Attorney General
EDWIN S. KNEEDLER
Deputy Solicitor General
MALCOLM L. STEWART
Assistant to the Solicitor General
DOUGLAS N. LETTER
SCOTT R. MCINTOSH
Attorneys
Department of Justice
Washington, D.C. 20530
(202) 514-2217

60 pp

QUESTIONS PRESENTED

The Line Item Veto Act, 2 U.S.C. 691 *et seq.* (Supp. II 1996), gives the President conditional authority to cancel certain spending and revenue items within five days after a bill containing such items has been enacted into law. The questions presented are as follows:

1. Whether the appellees' challenge to the constitutionality of the Act presents a justiciable controversy.

2. Whether the Act violates Article I of the Constitution or principles of separation of powers.

PARTIES TO THE PROCEEDINGS

The appellants here, who were the defendants in the district court, are William J. Clinton, the President of the United States; Donna E. Shalala, the Secretary of Health and Human Services; Franklin D. Raines, the Director of the Office of Management and Budget; and Robert E. Rubin, the Secretary of the Treasury. The appellees here, who were the plaintiffs below, are the City of New York; the New York City Health and Hospitals Corporation; the Greater New York Hospital Association; the Jamaica Hospital Medical Center; District Council 37, American Federation of State, County, and Municipal Employees; Local 1199, National Health and Human Service Employees Union; Snake River Potato Growers, Inc.; and Mike Cranney.

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BRIEF FOR THE APPELLANTS

OPINION BELOW

The opinion of the district court (J.S. App. 1a-33a) is not yet reported.

JURISDICTION

The order of the district court was entered on February 12, 1998. A notice of appeal (J.S. App. 34a-35a) was filed on February 13, 1998. This Court noted probable jurisdiction on February 27, 1998. The jurisdiction of this Court rests on 2 U.S.C. 692(b) (Supp. II 1996).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. The Presentment Clause of the United States Constitution, Art. I, § 7, Cl. 2, is reproduced at J.S. 2.

2. The Line Item Veto Act, 2 U.S.C. 691 *et seq.* (Supp. II 1996), is reproduced at J.S. App. 36a-60a.

3. Section 4722(c) of the Balanced Budget Act of 1997, Pub. L. No. 105-33, 111 Stat. 515, is reproduced at J.S. App. 72a.

4. Section 968 of the Taxpayer Relief Act of 1997, Pub. L. No. 105-34, 111 Stat. 895-896, is reproduced at J.S. App. 72a-74a.

STATEMENT

1. The Line Item Veto Act, 2 U.S.C. 691 *et seq*. (Supp. II 1996), gives the President conditional authority to cancel certain spending and revenue items within five days after a bill containing such items has been enacted into law. The Act is the latest in a series of statutes, dating from 1789 to the present, in which Congress has given the Executive Branch discretion over the expenditure of appropriated funds.

a. In September 1789, the First Congress appropriated "sum[s] not exceeding" specified amounts for the expenses of the War Department, government salaries, military pensions, and outstanding debt. See Act of Sept. 29, 1789, ch. 23, § 1, 1 Stat. 95. The First Congress subsequently enacted two additional general appropriations laws, which likewise appropriated "sum[s] not exceeding" specified amounts for the government's operations. Act of Mar. 26, 1790, ch. 4, § 1, 1 Stat. 104; Act of Feb. 11, 1791, ch. 6, § 1, 1 Stat. 190. See Ralph S. Abascal & John R. Kramer, *Presidential Impoundment Part I: Historical Genesis and Constitutional Framework*, 62 Geo. L.J. 1549, 1579 (1974). By appropriating sums "not exceeding" specified amounts, Congress gave the President discretion not to obligate the full amount of the appropriations. It has since become a commonplace of federal appropriations law that an appropriation "not exceeding" a specified sum leaves the Executive Branch with discretion to spend less than the full amount of the appropriation, absent some other statutory restriction on that discretion. See, *e.g.*, H.R. Rep. No. 1797, 81st Cong., 2d Sess. 9 (1950) ("Appropriation of a given amount for a particular activity constitutes only a

ceiling upon the amount which should be expended for that activity.").

The laws passed by the First Congress vested Executive Branch officials with a second form of discretion as well. Those laws provided what are now known as "lump-sum" appropriations—that is, appropriations for the operation of a department that do not specify the particular items for which the funds are to be used. The President was thereby given discretion not only with respect to the amount of the appropriated sum that would be spent, but also with respect to its allocation among authorized uses.

Shortly after the First Congress, appropriations laws began to make increased use of earmarked, rather than lump-sum, appropriations. See Abascal & Kramer, *supra*, 62 Geo. L.J. at 1579-1580. However, Congress soon recognized the continued need to provide the Executive Branch with discretion to move appropriations within departments In 1809, Congress vested the President with recess authority "to direct * * * that a portion of the monies appropriated for a particular branch of expenditure in [a] department, be applied to another branch of expenditure in the same department." Act of Mar. 3, 1809, ch. 28, § 1, 2 Stat. 535-536. That authority remained in effect, with various modifications, for nearly 60 years. See Louis Fisher, *Presidential Spending Discretion and Congressional Controls*, 37 Law & Contemp. Probs. 135, 148 & nn.71-72 (1972). Congress continued to resort to lump-sum appropriations when Executive Branch discretion and flexibility were viewed as desirable, particularly during periods of economic and military crisis. See *id.* at 136.

In 1933, in response to the fiscal pressures created by the Great Depression, Congress granted the President broad discretion to refrain from spending appropriated funds. Congress authorized the President to "reduce [governmental] expenditures" by abolishing, consolidating, or transferring Executive Branch agencies and functions. Act of Mar. 3, 1933, ch. 212, § 16, 47 Stat. 1517-1519 (amending Act of June 30, 1932, ch. 314, §§ 401-408, 47 Stat. 413-

415)). All appropriations "unexpended by reason of" the President's exercise of his reorganization authority were to be "impounded and returned to the Treasury." *Id.* at 1519. Congress also conferred discretionary impoundment authority in the Department of War's 1933 appropriations act, which authorized the President to impound "[a]ny sums appropriated in this Act for or on account of the Military Establishment, or any portion of such sums, that may not be needed for the purposes for which appropriated." Act of Mar. 4, 1933, ch. 281, § 4, 47 Stat. 1602.

In 1950, Congress provided the Executive Branch with general authority to establish "reserves"—that is, to withhold the expenditure of appropriated funds—in order "to provide for contingencies, or to effect savings whenever savings are made possible by or through changes in requirements, greater efficiency of operations, or other [post-appropriation] developments." General Appropriation Act, 1951, ch. 896, § 1211, 64 Stat. 765-766. Congress further provided that appropriations and contract authorization made by the Act for the Executive Branch were to be reduced by "at least" $550 million below appropriated levels; apart from specifying that the reductions not "impair[] national defense," Congress did not prescribe what spending to reduce or how large particular reductions should be. § 1214, 64 Stat. 768.

During the Vietnam War, Congress gave the President still greater discretionary authority over expenditures of appropriated funds. See Abascal & Kramer, 62 Geo. L.J. at 1569 & n.90; Fisher, 37 Law & Contemp. Probs. at 160-161. The Revenue and Expenditure Control Act of 1968, Pub. L. No. 90-364, §§ 202(a), 203(a), 82 Stat. 271-272, imposed strict ceilings on budget outlays and new obligation authority for the next fiscal year. To meet those ceilings, Congress authorized the President to reserve as much as $6 billion in outlays and $10 billion in new obligation authority, with no restrictions on the President's discretion regarding what spending to reduce. §§ 202(b), 203(b), 82 Stat. 272. Congress provided the President with similar authority in

subsequent years. See Second Supplemental Appropriations Act, 1969, Pub. L. No. 91-47, § 401, 83 Stat. 82; Second Supplemental Appropriations Act, 1970, Pub. L. No. 91-305, §§ 401, 501, 84 Stat. 405-407.

b. In each of the foregoing instances, the Executive Branch was authorized by statute to withhold appropriated sums. During the early 1970s, however, President Nixon asserted a general authority to impound appropriated funds whether or not Congress intended for the appropriations involved to be discretionary. See, *e.g.*, 9 Weekly Comp. Pres. Doc. 110 (Feb. 5, 1973). The Nixon Administration's effort to impound appropriations for a wide range of federal programs led to a series of lawsuits. See, *e.g.*, *City of New Haven* v. *United States*, 634 F. Supp. 1449, 1454-1455 & n.6 (D.D.C. 1986) (summarizing cases), aff'd, 809 F.2d 900 (D.C. Cir. 1987); Ralph S. Abascal & John R. Kramer, *Presidential Impoundment Part II: Judicial and Legislative Responses*, 63 Geo. L.J. 149, 151-168 (1974); Nile Stanton, *History and Practice of Executive Impoundment of Appropriated Funds*, 53 Neb. L. Rev. 1, 14-30 (1974). The courts resolved those disputes by construing the applicable appropriations statutes to determine whether Congress intended for the President to have discretion over expenditure of the impounded funds. In *Train* v. *City of New York*, 420 U.S. 35 (1975), for example, this Court held that the President lacked authority to impound funds appropriated for grants under Title II of the Federal Water Pollution Control Amendments of 1972, Pub. L. No. 92-500, § 2, 86 Stat. 833. The Court reviewed the text and history of the Act to determine whether "Congress intended to confer any discretion on the Executive to withhold funds from this program." 420 U.S. at 44. The Court and the parties presupposed that Congress could, if it chose, vest the Executive Branch with such discretion; the only issue was whether it had chosen to do so.

In response to the impoundment controversy, Congress enacted the Impoundment Control Act of 1974 (ICA), Pub.

L. No. 93-344, Tit. X, 88 Stat. 332 (codified as amended at 2 U.S.C. 681 *et seq.*). The ICA distinguished between two forms of impoundment: deferrals (delays in spending during the course of a fiscal year, or other period of availability) and rescissions (permanent withholdings of spending of appropriated funds). See 2 U.S.C. 682(1), 682(3). While generally authorizing the President to carry out deferrals, see 2 U.S.C. 684 (1982), the Act prohibited the President from engaging in unilateral rescissions. Instead, it authorized the President to propose rescissions to Congress under a mechanism for expedited legislative consideration. 2 U.S.C. 683 (1982). The ICA also narrowed the circumstances in which the Executive Branch could place appropriated funds in reserves. See ICA § 1002, 88 Stat. 332.

2. The Line Item Veto Act was enacted in April 1996 as an amendment to the ICA. See Pub. L. No. 104-130, 110 Stat. 1200 (J.S. App. 36a-60a) (codified at 2 U.S.C. 691 *et seq.* (Supp. II 1996)). The Act expires on January 1, 2005. 2 U.S.C. 691 note (Supp. II 1996). It authorizes the President to "cancel in whole" specific spending and revenue items contained in any bill or joint resolution "that has been signed into law pursuant to Article I, section 7, of the Constitution of the United States." 2 U.S.C. 691(a) (Supp. II 1996).

The President's cancellation authority extends to three categories of budget items: (1) "dollar amount[s] of discretionary budget authority," (2) "item[s] of new direct spending," and (3) "limited tax benefit[s]." 2 U.S.C. 691(a) (Supp. II 1996). A "dollar amount of discretionary budget authority" is "the entire dollar amount of budget authority" that is specified for a particular purpose in an appropriations law or is otherwise identified through charts, documents, calculations, or references to other laws. 2 U.S.C. 691e(7)(A) (Supp. II 1996). An "item of new direct spending" is a specific provision that will result in "an increase in budget authority or outlays" for entitlements, food stamps, or other programs funded other than through

annual appropriations. 2 U.S.C. 691e(8) (Supp. II 1996).[1] A "limited tax benefit" is a revenue-losing provision that gives a tax reduction to 100 or fewer beneficiaries, or a provision that gives "temporary or permanent transitional relief" to ten or fewer beneficiaries. 2 U.S.C. 691e(9)(A) (Supp. II 1996).[2]

Cancellation of a dollar amount of discretionary budget authority operates to "rescind" that authority. 2 U.S.C. 691e(4)(A) (Supp. II 1996). Cancellation of an item of new direct spending or a limited tax benefit renders the cancelled spending or revenue provision without "legal force or effect." 2 U.S.C. 691e(4)(B) and (C) (Supp. II 1996). The President may not use funds covered by a cancellation for any purpose other than deficit reduction. 2 U.S.C. 691b(b), 691c (Supp. II 1996). Deficit reduction is accomplished through a statutory "lockbox" procedure, under which the Director of the Office of Management and Budget (OMB) must calculate the deficit reduction from the cancellation and "lock in" the savings by adjusting the calculations submitted to Congress under the Gramm-Rudman-Hollings Act. 2 U.S.C. 691c(a) and (b) (Supp. II 1996); H.R. Conf. Rep. No. 491, *supra*, at 23-24.

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[1] The Act defines the term "direct spending" to include "(A) budget authority provided by law (other than an appropriation law); (B) entitlement authority; and (C) the food stamp program." 2 U.S.C. 691e(5) (Supp. II 1996). An "item of new direct spending" is a provision of law estimated to result in direct spending in excess of the "baseline" levels calculated pursuant to Section 257 of the Balanced Budget and Emergency Deficit Control Act of 1985, 2 U.S.C. 907. See 2 U.S.C. 691e(8) (Supp. II 1996); see also H.R. Conf. Rep. No. 491, 104th Cong., 2d Sess. 36 (1996). An increase in outlays for such entitlements resulting from automatic cost-of-living or comparable adjustments under *existing* law is in the "baseline" and therefore is not an item of "new" direct spending under the Line Item Veto Act.

[2] The Act provides for the Joint Committee on Taxation to identify the limited tax benefits contained in any revenue bill. 2 U.S.C. 691f(a) (Supp. II 1996). If Congress incorporates the Joint Committee's statement into the law as finally enacted, the President's authority to cancel limited tax benefits is confined to the items, if any, identified in that law. 2 U.S.C. 691f(b) and (c) (Supp. II 1996).

If the President wishes to exercise his cancellation authority, he must submit a special message to Congress within five calendar days (excluding Sundays) after enactment of the law containing the cancelled item. 2 U.S.C. 691(a)(B), 691a(c)(1) (Supp. II 1996). The President may cancel an item only if he determines that doing so will "(i) reduce the Federal budget deficit; (ii) not impair any essential Government functions; and (iii) not harm the national interest." 2 U.S.C. 691(a)(A) (Supp. II 1996). He must also consider "the legislative history, construction, and purposes of the law" containing the item, as well as "any specific sources of information referenced in such law." 2 U.S.C. 691(b)(1) and (2) (Supp. II 1996). In addition, the President's special message to Congress must identify, *inter alia*, the reasons for the cancellation; the President's estimate of the "fiscal, economic, and budgetary effect" of the cancellation; his estimate of "the * * * effect of the cancellation upon the objects, purposes and programs for which the canceled authority was provided"; and the geographic distribution of the cancelled spending. 2 U.S.C. 691a(b) (Supp. II 1996).

A cancellation takes effect upon Congress's receipt of the President's special message. 2 U.S.C. 691b(a) (Supp. II 1996). The Act provides for highly expedited legislative consideration of "disapproval bills." 2 U.S.C. 691d, 691e(6) (Supp. II 1996). If a disapproval bill is enacted into law, all disapproved cancellations become null and void and the cancelled items become effective. 2 U.S.C. 691b(a) (Supp. II 1996). A disapproval bill is not subject to the President's cancellation authority under the Act. 2 U.S.C. 691(c) (Supp. II 1996).

Although the Line Item Veto Act establishes general rules for the execution of budgetary laws, nothing in the Act purports to prevent Congress from determining that the President's cancellation authority shall not apply to a particular spending or revenue bill or any portion thereof. See *Raines* v. *Byrd*, 117 S. Ct. 2312, 2320 (1997) (Congress

may "exempt a given appropriations bill (or a given provision in an appropriations bill) from the Act").

3. The Line Item Veto Act took effect on January 1, 1997. See 2 U.S.C. 691 note (Supp. II 1996). Immediately thereafter, several Members of Congress filed an action for declaratory relief, contending that the Act violates Article I of the Constitution and principles of separation of powers. The district court ruled in favor of the plaintiffs, holding that they had standing and that the Act is unconstitutional. *Byrd* v. *Raines*, 956 F. Supp. 25 (D.D.C. 1997). On appeal, this Court vacated the district court's judgment, holding that the plaintiff Members of Congress lacked standing under Article III. *Raines* v. *Byrd*, *supra*.

4. At the time of this Court's decision in *Raines*, the President had not yet cancelled any spending or revenue item pursuant to the Act. Since then, the President has exercised his cancellation authority on several occasions. The present litigation arises out of two specific cancellations.

a. The first cancellation involves a spending provision that granted the State of New York preferential treatment regarding federal payments under the Medicaid program. States that participate in the Medicaid program receive matching funds from the federal government, which are based on a State's allowable medical assistance expenditures. See generally 42 U.S.C. 1396b(a). Under amendments enacted in 1991, the amount of a State's allowable medical assistance expenditures is reduced by the revenue that the State receives from health care related taxes unless, *inter alia*, the taxes are "broad based." 42 U.S.C. 1396b(w)(1)(A)(ii). If a particular health care related tax does not satisfy the statutory criteria for "broad based" taxes (see 42 U.S.C. 1396b(w)(3)(B) and (C)), the State may file a waiver application with the Secretary of Health and Human Services (HHS) requesting that she nevertheless "treat [the] tax as a broad-based health care related tax." 42 U.S.C. 1396b(w)(3)(E)(i). The Secretary must approve the application if the State establishes that the net impact

of the tax and associated expenditures proposed by the State is "generally redistributive in nature" and that the amount of the tax is not "directly correlated" to payments under the federal Medicaid Program for the items and services on which the tax is imposed. 42 U.S.C. 1396b(w)(3)(E)(ii).

The waiver application is reviewed by the Health Care Financing Administration (HCFA), an agency within HHS. See 42 C.F.R. 433.68, 433.72. If HCFA determines that a tax is not a broad-based health care related tax and denies a request for a waiver, the result is to effect a deduction from the State's covered medical asistance expenditures to that extent, and the amount of the federal payments to the State is reduced accordingly. See 42 U.S.C. 1396b(w)(1)(A); 42 C.F.R. 433.70(b). The State may appeal any such disallowance to the Department's Grants Appeals Board, see 42 C.F.R. 430.42; 45 C.F.R. Part 16 (procedures for such appeals); J.S. App. 6a-7a; J.A. 38-39, and then may seek judicial review of the final decision of the Board in federal district court pursuant to the Administrative Procedure Act, 5 U.S.C. 701 *et seq*. See *Bowen* v. *Massachusetts*, 487 U.S. 879 (1988).

In 1994, HCFA notified the State of New York that certain health care related taxes levied by the State are not "broad based" and therefore must be taken into account in calculating the State's federal Medicaid payment. See J.S. App. 6a-7a. The State subsequently filed over 60 applications for waivers. *Ibid.* As of this date, no formal action has been taken by HCFA on any of New York's pending waiver applications. *Ibid.* While the applications remain pending, the state taxes at issue are disregarded in determining New York's allowable medical assistance expenditures. See J.A. 39. As a result, no reduction in federal Medicaid payments to New York has taken place. *Ibid.*

On August 5, 1997, the Balanced Budget Act of 1997 was enacted into law. Pub. L. No. 105-33, 111 Stat. 251. Section 4722(c) of the Act provided that health care related taxes collected by New York before June 1, 1997, for which

waiver applications were still pending, "are deemed to be permissible health care related taxes and in compliance with the requirements of [42 U.S.C. 1396b(w)(3)(B) and (C)]" for broad based taxes. 111 Stat. 515; J.S. App. 72a. On August 11, 1997, the President sent Congress a special message (see p. 11, *supra*) cancelling Section 4722(c) as an "item of new direct spending" under the Act. J.S. App. 61a-65a.

b. The second cancellation at issue here involves a tax provision that would have given special treatment to a small class of agricultural stock sales. As a general matter, Section 1042 of the Internal Revenue Code permits taxpayers to defer recognition of capital gains from the sale of certain stock to employee stock ownership plans (ESOPs) or eligible worker-owned cooperatives. 26 U.S.C. 1042. The capital gains are not recognized until the taxpayer sells the replacement property purchased with the proceeds of the original sale. Section 1042 thus defers, but generally does not eliminate, the capital gains tax on such transactions. Because the capital gain accrues to the seller, Section 1042 affects the tax liability of the seller rather than that of the buyer.

On August 5, 1997, the Taxpayer Relief Act of 1997 was enacted into law. Pub. L. No. 105-34, 111 Stat. 788. Section 968 of the Act added a new subsection (g) to 26 U.S.C. 1042 to extend its coverage to taxpayers who, after December 31, 1997, sell stock of a domestic corporation that is a "qualified" refiner or processor of agricultural or horticultural products to an "eligible" farmers' cooperative. 111 Stat. 895-896; J.S. App. 72a-74a. Section 1701 of the Taxpayer Relief Act contained an "identification of limited tax benefits subject to line item veto," 111 Stat. 1099, and Section 968 was listed among those provisions, see *id.* at 1101. On August 11, 1997, the President sent Congress a special message cancelling Section 968 (as well as another provision of the Taxpayer Relief Act). J.S. App. 66a-71a.

c. The instant case involves two suits filed in October 1997 pursuant to the special judicial review provision of

the Line Item Veto Act, 2 U.S.C. 692 (Supp. II 1996). The first suit, *City of New York* v. *Clinton*, Civ. No. 97-2393 (D.D.C.), challenged the President's cancellation of Section 4722(c) of the Balanced Budget Act. Although Section 4722(c) concerned federal payments to the State of New York, the State itself did not file suit and is not a party to this case. Instead, the suit was filed by the City of New York, the New York City Health and Hospitals Corporation, the Greater New York Hospital Association, a local hospital, and two local unions. The plaintiffs (appellees in this Court) asserted that the appellee health care providers will be required to pay additional state taxes and assessments if New York's pending waiver applications are ultimately denied, and that the President's cancellation of Section 4722(c) "reinstate[d]" the appellee providers' "exposure" to those tax obligations. J.A. 28-29.

The second suit, *Snake River Potato Growers, Inc.* v. *Rubin*, Civ. No. 97-2463 (D.D.C.), challenged the President's cancellation of Section 968 of the Taxpayer Relief Act. The plaintiffs in *Snake River* (appellees in this Court) are an Idaho farmers' cooperative and a potato grower who is a member, director, and vice-chairman of the cooperative. Appellees alleged that the cooperative is an "eligible farmers' cooperative" within the meaning of Section 968. J.A. 13. Appellees did not assert that the cancellation of Section 968 had affected or could affect their own tax liability. Instead, they alleged that the cancellation would make it more difficult, and "generally" more expensive, for the cooperative to purchase the facilities of agricultural processors who are supplied by the cooperative's members. J.A. 15.

d. The district court consolidated the *City of New York* and *Snake River* suits into a single proceeding.[3] The government moved to dismiss both suits on standing and

[3] A third suit challenging the constitutionality of the Act, *NTEU* v. *United States*, Civ. No. 97-2399 (D.D.C.), was also made a part of the consolidated proceeding. However, *NTEU* was subsequently resolved on non-constitutional grounds, and it is not a part of this appeal.

ripeness grounds, and the parties filed cross-motions for summary judgment on the merits. The district court denied the motion to dismiss and granted summary judgment to appellees in both suits. J.S. App. 1a-33a.

The court first held that the appellees in both cases have standing under Article III. J.S. App. 11a-21a. In *City of New York*, the court explained that Section 4722(c) provided a benefit to the appellee health care providers by protecting them from "any [state tax] liability that otherwise might befall them," and that "the President took that benefit away" when he cancelled Section 4722(c). *Id.* at 13a. The court dismissed as irrelevant the fact that New York is seeking administrative waivers and that the providers will not face new state tax liabilities unless the waivers are denied. *Id.* at 13a-14a. The court regarded it as "more likely than not" that New York will be required to refund at least some of its federal Medicaid payment at the conclusion of the administrative process, and "highly likely" that the providers will be required to indemnify New York for any such repayments. *Id.* at 15a.

In *Snake River*, the court concluded that the President's cancellation of Section 968 caused the appellees "an immediate, concrete injury" because it prevented them from competing "on equal footing with investor-owned businesses." J.S. App. 15a-16a.[4] The court construed this Court's decision in *Northeastern Florida Chapter of Associated General Contractors* v. *City of Jacksonville*, 508 U.S. 656 (1993), to hold that "the inability to compete on an equal basis in the bidding process is injury in fact."

[4] The court stated:

> Before section 968 was passed, investor-owned businesses could structure acquisitions of processing facilities as tax-deferred stock-for-stock exchanges. Farmers' cooperatives could not exchange their stock because a cooperative's stock can be held only by its members. Section 968 would have allowed sellers to defer capital gains taxes on sales to farmers' co-ops, thus putting co-ops in the same competitive position as investor-owned businesses.

J.S. App. 16a.

J.S. App. 16a. The court also found it "likely" that the appellees would have benefitted "in a concrete way" from the ability of sellers of agricultural processing facilities to defer capital gains under Section 968. *Id.* at 17a. Although Section 968 governed the tax liability of sellers, rather than that of purchasers, the court concluded that Section 968 would have "allow[ed] [appellees] to pay a lower purchase price" or, "at the very least," would have "give[n] [appellees] some room to negotiate in terms of price." *Id.* at 17a-18a.

On the merits, the district court held that the Act violates the Presentment Clause of Article I and principles of separation of powers. J.S. App. 22a-33a. The court acknowledged that "the initial passage of the Balanced Budget Act and the Taxpayer Relief Act complied with the" requirements of Article I. *Id.* at 24a. The court held, however, that the President's cancellation of individual items contained within those laws was constitutionally infirm because "[t]he laws that resulted after the President's line item veto were different from those consented to by both Houses of Congress." *Ibid.* The court concluded that "[b]ecause the Line Item Veto Act produced laws in violation of the requirement of bicameral passage, because it permitted the President unilaterally to repeal or amend duly enacted laws, and because it impermissibly attempts to evade the requirement that the President sign or reject a bill *in toto*, the Act violates the requirements of Article I." *Id.* at 27a. The court also held that the Act offends separation of powers principles because it authorizes the President to perform "an inherently legislative function, namely, the authority to permanently shape laws and package legislation." *Id.* at 29a.

SUMMARY OF ARGUMENT

1. Appellees cannot satisfy the requirements of Article III. Appellees in *City of New York* contend that the challenged cancellation will likely lead to a decrease in federal Medicaid payments to the State of New York, and

that the State will ultimately recoup the funds from appellees. The cancellation at issue here, however, will have no effect upon New York's entitlement to funds unless and until HHS denies the State's waiver applications. And even if some or all of those applications are ultimately denied, any financial loss that appellees may suffer will result from the independent decisions of New York legislative and executive officials regarding the appropriate structure and implementation of the State's tax laws. Because appellees cannot demonstrate either that they are faced with actual or imminent injury, or that any harm they may ultimately suffer would be fairly traceable to the challenged cancellation, they cannot satisfy the requirements of Article III.

The *Snake River* appellees' suit likewise requires considerable speculation as to the likely behavior of persons not before the Court. The cancellation that appellees challenge could not affect their own tax liabilities. Appellees contend that the cancelled tax provision would have created incentives for agricultural processors to sell their facilities, and that appellees' chances of purchasing such facilities on favorable terms will be enhanced if the cancellation is held invalid. This Court has been properly reluctant, however, to recognize standing on the part of litigants who are not themselves the objects of the federal tax provisions that they wish to challenge. In the instant case, appellees have failed to adduce facts showing either that the cancellation has prevented them from acquiring a processing facility, or that they would be able to acquire such a facility in the future if this suit were resolved in their favor.

2. The Line Item Veto Act is constitutional. Its title notwithstanding, the Act does not authorize the President to sign into law some provisions of a tax or spending bill while "returning" other provisions to Congress. The President remains subject to the constitutional obligation to sign or return, in its entirety, a bill presented to him by Congress. His cancellation authority under the Act

comes into existence only after a tax or spending bill has been passed by both Houses of Congress and approved, *in toto*, by the President.

The Act does not authorize the President to amend or repeal provisions of subsequent budgetary laws. Because Congress is presumed to legislate with an awareness of existing law, its passage of a spending or tax bill that does not otherwise specify the scope of the President's discretion must be construed to authorize him either to implement, or to cancel, each item covered by the Act. There is consequently no basis for the district court's view that the cancellations at issue in this case altered the laws passed by Congress or otherwise subverted the legislative will.

Finally, the scope of authority vested in the President by the Act is consistent both with historical practice and with this Court's decisions. From the beginning of the Republic, Congress has frequently conferred upon the President substantial discretion over the expenditure of appropriated funds. The Line Item Veto Act places constitutionally sufficient limits on the President's exercise of discretion over federal spending. The Act requires the President to cancel items "in whole" rather than in part and to devote any cancelled amounts to deficit reduction, and it provides meaningful guidance to the President in his decision whether particular items should be cancelled.

ARGUMENT

I. APPELLEES' CHALLENGE TO THE CONSTITUTIONALITY OF THE LINE ITEM VETO ACT IS NONJUSTICIABLE

Appellees' constitutional challenges to the Line Item Veto Act should be dismissed without reaching the merits, because those challenges are not justiciable. As an initial matter, it appears that most of the appellees do not have standing under the special statutory provision for constitutional challenges to the Line Item Veto Act, 2 U.S.C. 692(a)(1) (Supp. II 1996), because that Section provides for

suits only by an "individual" adversely affected by the Act. In ordinary usage, the term "individual" refers to a "single human being," *The Random House Dictionary of the English Language* 974 (2d ed. 1987); accord *Webster's Third New International Dictionary* 1152 (1986), not a corporation, cooperative, or governmental entity. See also 1 U.S.C. 1 (emphasis added) (the word "person" "include[s] corporations, companies, associations, firms, partnerships, societies, and joint stock companies, *as well as individuals*").[5] In any event, appellees' claims are not justiciable under Article III of the Constitution.

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[5] While the bill that eventually was enacted into law as the Line Item Veto Act was under consideration, a judicial review provision was adopted as a floor amendment in both the House of Representatives and the Senate that would have provided for suits by "any Member of Congress." See 141 Cong. Rec. H1138-H1139 (Feb. 2, 1995); *id.* at S4244-S4245, S4259 (Mar. 21, 1995); see also *id.* at S4485 (Mar. 23, 1995) (bill as passed by Senate); *id.* at H5097 (May 17, 1995) (bill as passed by House). Before the bill was sent to conference, however, Senator Simon expressed concern that the judicial review provision might not accomplish its purpose because the federal courts had raised some question whether a Member of Congress has standing to pursue such a suit under Article III. He accordingly proposed that the bill be amended in conference to provide for a test challenge to be brought under the expedited judicial review provision not only by any Member of Congress, but also by "any person" adversely affected by the Act. See *id.* at S4476 (Mar. 23, 1995). Senator Simon sought and obtained assurances from Senator McCain, the manager of the bill in the Senate, that it would be the latter's intent to specify that "any person" could bring such a suit. *Ibid.* The bill reported by the conference committee and passed by Congress, however, provided for suits only by "any individual," rather than by "any person," adversely affected. The Conference Report recites the "any individual" language, but without any explanation as to why that language was chosen. See H.R. Conf. Rep. No. 491, *supra*, at 41; see also 142 Cong. Rec. S2942-S2943 (Mar. 27, 1996) (remarks of Sen. Byrd) (referring, without elaboration, to authorization for suits by "any individual").

Appellants did not argue in the district court or in the jurisdictional statement in this Court that the appellees who are not natural persons may not bring an action under 2 U.S.C. 692. To the extent that that Section's reference to "any individual" imposes a jurisdictional limitation (see *Steel Co.* v. *Citizens for a Better Envt.*, No. 96-643 (Mar. 4,

Article III confines the jurisdiction of the federal courts to actual "Cases" and "Controversies," and "the doctrine of standing serves to identify those disputes which are appropriately resolved through the judicial process." *Whitmore* v. *Arkansas*, 495 U.S. 149, 155 (1990).

> To satisfy the "case" or "controversy" requirement of Article III, which is the "irreducible constitutional minimum" of standing, a plaintiff must, generally speaking, demonstrate that he has suffered "injury in fact," that the injury is "fairly traceable" to the actions of the defendant, and that the injury will likely be redressed by a favorable decision.

Bennett v. *Spear*, 117 S. Ct. 1154, 1161 (1997). The standing inquiry is "especially rigorous when reaching the merits of the dispute would force [the courts] to decide whether an action taken by one of the other two branches of the Federal Government was unconstitutional." *Raines* v. *Byrd*, 117 S. Ct. 2312, 2317-2318 (1997).

When a plaintiff seeks to predicate his standing on an anticipated future injury, he must show that the injury is "imminent." *Lujan* v. *Defenders of Wildlife*, 504 U.S. 555, 564 & n.2 (1992); *Bennett*, 117 S. Ct. at 1163; *Whitmore*, 495 U.S. at 155. The imminence requirement serves "to ensure that the alleged injury is not too speculative for Article III purposes—that the injury is *certainly* impending." *Defenders of Wildlife*, 504 U.S. at 564-565 n.2 (internal quotation marks omitted). A similar concern for the avoidance of premature and possibly unnecessary litigation underlies the requirement that a suit be "ripe" for adjudication. See *Warth* v. *Seldin*, 422 U.S. 490, 499 n.10 (1975) (noting "close affinity" between ripeness and standing doctrines). Both ripeness and standing principles serve to ensure that the federal courts resolve disputed legal questions "only in the last resort, and as a necessity

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(Mar. 4, 1998), slip. op. 7), however, it presumably cannot be waived. Compare *Air Courier Conference* v. *American Postal Workers Union*, 498 U.S. 517, 522-523 & n. 3 (1991).

in the determination of real, earnest and vital controversy." *Valley Forge Christian College* v. *Americans United for Separation of Church & State, Inc.*, 454 U.S. 464, 471 (1982) (quoting *Chicago & Grand Trunk Ry.* v. *Wellman*, 143 U.S. 339, 345 (1892)).

"[W]hen the plaintiff is not himself the object of the government action or inaction he challenges, standing is not precluded, but it is ordinarily 'substantially more difficult' to establish." *Defenders of Wildlife*, 504 U.S. at 562 (quoting *Allen* v. *Wright*, 468 U.S. 737, 758 (1984)); *Simon* v. *Eastern Kentucky Welfare Rights Org.*, 426 U.S. 26, 44-45 (1975). When a third party is the immediate object of the challenged governmental action, "it becomes the burden of the plaintiff to adduce facts showing that" the third party can be expected to behave "in such manner as to produce causation and permit redressability of injury." *Defenders of Wildlife*, 504 U.S. at 562 (citations omitted). The appellees in the instant case are not themselves the objects of the spending and tax provisions cancelled by the President, and the entities that *are* directly subject to those provisions are conspicuous by their absence from this litigation. Because appellees' claims of injury rest on speculation about the independent decisions of third parties whose future actions "the courts cannot presume either to control or to predict," *ibid.*, their claims are not justiciable.

A. *City of New York*

Appellees in *City of New York* do not contend that the President's cancellation of Section 4722(c) of the Balanced Budget Act of 1997 will or could affect their own entitlement to receive funds from the federal government. Any such contention would be implausible, since federal payments under the Medicaid program are made exclusively to participating States, not to health care providers or local governments. See J.A. 37. Rather, appellees contend that (1) the challenged cancellation will likely lead to a decrease in federal Medicaid payments to the State of New

York, and (2) the State will ultimately recoup the lost funds from the appellee health care providers. See J.A. 27-29.[6] Because appellees are not presently faced with any actual or imminent injury, and because any harm they may ultimately suffer would not be fairly traceable to the challenged cancellation, appellees cannot satisfy the requirements of Article III.

1. As we explain above (see p. 10, *supra*), the President's cancellation of Section 4722(c) has thus far effected no reduction in federal Medicaid payments to the State of New York. See J.A. 40. The State has continued to receive exactly the same amount of federal money as it would have received if Section 4722(c) had not been cancelled. *Ibid.* Federal payments to New York will remain unaffected unless and until the State's waiver applications are denied by the Secretary. J.A. 38-39. If New York is entitled to the waivers, as it claims to be, no reduction will occur.

This Court has previously recognized that the possibility of future financial loss may be insufficient to create a justiciable dispute where the occurrence of the loss is contingent on the outcome of an as-yet unresolved administrative waiver application. In *Anderson* v. *Green*, 513 U.S. 557 (1995) (per curiam), for example, California residents brought suit to challenge the constitutionality of a state law that provided lower benefits to new residents than to long-term residents under the Aid to Families with Dependent Children (AFDC) program. Federal law required California to obtain a waiver from HHS in order to impose the AFDC payment differential, and the California statute provided that the differential would take effect only if such a waiver were granted. See *id.* at 558-559.

[6] The district court in *City of New York* confined its standing analysis to the appellee health care providers, who would be the direct objects of the state taxes in question. See J.S. App. 13a n.8. The standing of the other appellees in that suit is purely derivative of the claimed standing of the providers. See J.A. 29-30. We therefore direct the following discussion to the standing of the providers.

California received an HHS waiver, but the waiver was invalidated by a federal court of appeals. *Id.* at 559.

When the constitutional challenge reached this Court, a second California waiver application was pending before HHS. See Tr. Oral Arg. 6, 31 (No. 94-197); Resp. Br. 9 & n.6, 49 (No. 94-197). The Court held that in light of the uncompleted waiver process, "no justiciable controversy is before us, because the case in its current posture is not ripe." 513 U.S. at 559. The Court pointed out that "[a]bsent favorable action by HHS on a renewed application for a waiver, California will continue to treat [the plaintiffs] the same way it treats long-term California residents." *Ibid.* The Court therefore concluded that "[t]he parties have no live dispute now, and whether one will arise in the future is conjectural." *Ibid*; see also, *e.g.*, *Suitum* v. *Tahoe Regional Planning Agency*, 117 S. Ct. 1659, 1666 (1997) ("where the regulatory regime offers the possibility of a variance from its facial requirements, a landowner must go beyond submitting a plan for development and actually seek such a variance to ripen his [taking] claim"); *Ruckelshaus* v. *Monsanto Co.*, 467 U.S. 986, 1019-1020 (1984) (constitutional challenge to arbitration scheme not ripe until arbitrator has made an award); *Hodel* v. *Virginia Surface Mining & Reclamation Ass'n*, 452 U.S. 264, 297 (1981).

As in *Anderson*, appellees' potential injury depends on a future decision by the Secretary of HHS regarding the appropriate disposition of a State's waiver application. Only if the Secretary at that point finally determined that some or all of the state taxes do not satisfy the requirements of 42 U.S.C. 1396b(w), thereby triggering a reduction of funding to the State, would the predicate for the providers' liability to the State under state law for the amount then owed by the State to the federal government come into being. Appellees' claim therefore involves "contingent future events that may not occur as anticipated, or indeed may not occur at all." *Thomas* v. *Union Carbide Agric. Prods. Co.*, 473 U.S. 568, 580-581 (1985) (citation

omitted). At least until that time, appellees have no basis for an action against the United States.[7]

Any attempt to predict the outcome of the administrative process is inescapably speculative, because "the courts are unable to evaluate with any assurance the 'likelihood' that decisions will be made a certain way by policymaking officials acting within their broad and legitimate discretion." *ASARCO* v. *Kadish*, 490 U.S. 605, 615 (1989) (opinion of Kennedy, J.).[8] Contrary to the district court's conclusion (see J.S. App. 14a), the outcome of the administrative proceedings is not foreordained by HHS's prior assertion that, in the absence of new legislation, "the Secretary will move forward to complete the process already begun to apply with full force the current law." HHS's commitment to "apply with full force the current law" is in no way inconsistent with the future granting of waiver applications, since the waiver mechanism is itself part of "current law." See pp. 9-10, *supra*.[9]

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[7] Cf. *United States* v. *California*, 507 U.S. 746, 756 (1993) (quoting *United States* v. *Munsey Trust Co.*, 332 U.S. 234, 242 (1947)) (a subrogee "stands in the place of one whose claim he has paid").

[8] The district court's reliance (see J.S. App. 14a) on *INS* v. *Chadha*, 462 U.S. 919, 936-937 (1983), is misplaced. The petitioner for review (plaintiff) in *Chadha* was himself the direct object of the contested government action (a deportation order); he had already exhausted available administrative procedures to prevent entry of that order; and the order was therefore final and subjected him to immediate injury through removal from the country. Here, by contrast, the appellees are not the object of the cancelled spending provision, and the entity that is—the State of New York—is actively pursuing an administrative process that may afford it (and appellees) complete relief, and that thus far has insulated it (and the appellees) from any financial injury.

[9] The district court also believed that the President himself had foretold the eventual denial of New York's waiver applications when he certified, as required by the Act, that cancellation of Section 4722(c) "will reduce the Federal budget deficit." See J.S. App. 14a-15a, 61a-63a. The court misunderstood the significance of the President's certification. When Section 4722(c) was enacted into law, under the settled "scoring" rules used by the Office of Management and Budget (OMB) and the Congressional Budget Office, the provision was deemed

2. Even if New York's pending waiver applications are ultimately denied, nothing in federal law requires the State to seek recoupment from the appellee health care providers or otherwise limits the State's discretion regarding the appropriate response to the loss of federal funds. Any financial loss that appellees may suffer will result from independent decisions of state legislative and executive officials regarding the appropriate structure and implementation of the State's tax laws. Appellees' injury, if and when it occurs, therefore would not be "fairly traceable" to the President's cancellation of Section 4722(c).[10]

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to constitute approximately $200 million in "new direct spending" for purposes of the Line Item Veto Act—that is, a $200 million "increase in budget authority * * * relative to the most recent levels calculated pursuant to [2 U.S.C.] 907." 2 U.S.C. 691e(8) (Supp. II 1996). When the President cancelled Section 4722(c), the cancellation resulted in a corresponding $200 million reduction in budget authority. 2 U.S.C. 691e(4)(B) (Supp. II 1996); see J.S. App. 65a. The President's certification reflects that reduction in budget authority. The Act does not obligate the President to predict the future outcome of an administrative process, and his certification does not reflect such a prediction.

The district court also relied on a statement by the Director of OMB that New York's health care taxes "had been determined by HCFA to be illegal." J.S. App. 15a; see J.A. 68. That statement refers to HCFA's *initial* determination regarding the permissibility of the taxes in 1994 (see p. 10 *supra*), not to any determination regarding the merit of New York's subsequent waiver applications. The OMB Director also observed that the effect of the cancellation "will be that New York will be treated the same as the other states. And HHS is in the process now of resolving with those states how they will be treated with regard to the implications of these taxes in the past." J.A. 70.

[10] Article III's traceability requirement concededly "does not exclude injury produced by determinative or coercive effect upon the action of someone else." *Bennett*, 117 S. Ct. at 1164. But where the "someone else" is a sovereign State, courts should not lightly conclude that the State's choices are "determin[ed] or coerc[ed]" by federal policy. In the present case, federal law places no constraints on the State's discretion regarding the appropriate response to any budgetary shortfall that may result if HCFA ultimately denies New York's waiver applications.

In *Warth* v. *Seldin*, 422 U.S. 490 (1975), a number of plaintiffs brought suit to challenge the legality of exclusionary zoning practices by Penfield, a suburban community in the vicinity of Rochester, New York. Among the plaintiffs were Rochester taxpayers who claimed to be injured financially by Penfield's exclusionary regulations. See *id.* at 508. The Rochester taxpayers asserted "that Penfield's persistent refusal to allow or to facilitate construction of low-and moderate-cost housing force[d] the city of Rochester to provide more such housing than it otherwise would do," *ibid.*, and that Rochester taxpayers would ultimately be required to bear higher local property taxes to pay for the cost of such housing, *id.* at 508-509. This Court held that the taxpayers' allegations failed to establish the necessary causal nexus between Penfield's zoning regulations and their own tax liabilities. The Court explained:

> Apart from the conjectural nature of the asserted injury, the line of causation between [the suburb's zoning] actions and such injury is not apparent from the complaint. Whatever may occur in Penfield, the injury complained of—increases in taxation—results only from decisions made by the appropriate Rochester authorities, who are not parties to this case.

Id. at 509.

Similarly here, any future increase in the appellee health care providers' tax liabilities under New York law "results only from decisions made by the appropriate [State] authorities, who are not parties to this case." The independent authority of New York legislative and executive officials to enact and administer state tax provisions severs the "line of causation" between the President's cancellation of Section 4722(c) and any injury appellees may eventually suffer. Accord *Young* v. *Klutznick*, 652 F.2d 617, 624-625 (6th Cir. 1981), cert. denied, 455 U.S. 939 (1982); *City of Detroit* v. *Franklin*, 4 F.3d 1367, 1373 (6th Cir. 1993), cert. denied, 510 U.S. 1176 (1994).[11]

3. The district court also concluded that the appellee health care providers "suffered an immediate, concrete injury the moment that the President used the Line Item Veto to cancel section 4722(c)." J.S. App. 13a. The court held that Section 4722(c) furnished the providers with "a valuable protection against any [state tax] liability that otherwise might befall them," and that the elimination of that protection subjected appellees to a present, judicially cognizable injury. *Ibid.* That holding cannot be reconciled with this Court's precedents. The Court has repeatedly emphasized that a plaintiff's injury must be "concrete," *Defenders of Wildlife*, 504 U.S. at 560, and "palpable," *Warth*, 422 U.S. at 501, and that "[a]llegations of possible future injury do not satisfy the requirements of Art. III," *Whitmore*, 495 U.S. at 158. Those principles would be

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[11] In *Young*, the City of Detroit brought suit to challenge the federal government's administration of the 1980 census. Detroit asserted that the census had undercounted the city's population and that it would be injured by the Michigan legislature's use of the census figures to apportion congressional districts within the State. The Sixth Circuit held that federal law did not prevent the Michigan legislature from adjusting the census data for intrastate apportionment purposes and that the possibility of such an adjustment made the plaintiffs' asserted injury too speculative to permit adjudication of the suit. 652 F.2d at 625. In response to the plaintiffs' argument that the legislature was likely to use the unadjusted data, even if it was not legally compelled to do so, the court of appeals stated: "Having found no legal compulsion that the state act in a certain way, we may not predict what decisions the state legislature will, in fact make. * * * Thus we simply do not know whether plaintiffs will be harmed by the decision of the Bureau [of the Census] not to adjust its figures." *Ibid.* In *City of Detroit*, the court relied on its prior decision in *Young* in holding that the plaintiffs lacked standing even though redistricting (using the Census Bureau figures) had already occurred. The court explained that "if the Michigan legislature is not constitutionally compelled to use the Bureau's census data, then its decision (whether to use the data or not) is an independent act breaking the chain of causation between the challenged actions of the Census Bureau * * * and the injury to the plaintiffs." 4 F.3d at 1373.

wholly undercut if the absence of an absolute "protection" against possible future harm could be characterized as a judicially cognizable present injury.[12]

B. *Snake River*

1. Like the appellees in *City of New York*, the appellees in *Snake River* are not themselves "the object[s] of the government action * * * [they] challenge[]." *Lujan*, 504 U.S. at 562. As we explain above, Section 968 of the Taxpayer Relief Act of 1997 permitted taxpayers who sell the stock of "qualified" agricultural refiners or processors to "eligible" farmers' cooperatives to defer recognition of the capital gains, if any, resulting from such sales. See 26 U.S.C. 1042; J.S. App. 72a-74a. Section 968 alters the tax liabilities of sellers, not those of purchasers. As a result, the President's cancellation of Section 968 can have no effect on the tax liabilities of appellees, who wish to purchase agricultural processing facilities rather than to sell them.

Appellees allege that the cancellation of Section 968 will harm them by changing the financial terms on which Snake River might be able to purchase the stock of

[12] Under some circumstances, a plaintiff may be able to establish standing by demonstrating that prolonged uncertainty concerning the applicable law would subject him to substantial hardship. See, *e.g.*, *Abbott Labs.* v. *Gardner*, 387 U.S. 136, 154 (1967) (plaintiffs had standing to assert facial challenge to regulation that "require[d] them to make significant changes in their everyday business practices" and established substantial penalties for noncompliance). The cancellation at issue in the instant case, however, effects no change in the legality of appellees' own conduct. And while appellees have alleged in general terms that the cancellation burdens their "present abilities to engage in meaningful planning and borrowing of funds," J.A. 29, they have failed to identify any concrete instance in which the cancellation has affected their own present conduct or the willingness of others to transact business with them. Appellees acknowledged in the district court, for example, that the health care providers have not created a reserve to cover their potential liability to the State of New York, Tr. Oral Arg. 14 (D.D.C. Jan. 14, 1998), much less been required by law to do so.

qualified agricultural processors. See J.A. 15. They allege that Section 968 "would have allowed Snake River to offer * * * a lower price" for processing facilities and would have "encouraged" processors to accept such offers. *Ibid.* They further allege that, "[a]s a result of the cancellation of Section 968," Snake River must "generally" pay more for processing facilities "because the seller will owe taxes currently on any [capital] gain on the sales." *Ibid.* The appellees contend, in other words, that they will suffer an indirect financial injury because of the response of third parties (agricultural processors) to the cancellation of Section 968.

This Court has been properly reluctant to recognize standing on the part of litigants who are not themselves the objects of the federal tax provisions that they wish to challenge. In *Simon* v. *Eastern Kentucky Welfare Rights Organization*, *supra*, the Court held that low-income persons who had been denied treatment at local hospitals lacked standing to challenge an Internal Revenue Service (IRS) revenue ruling that was alleged to have reduced the amount of charitable care needed for the hospitals to qualify for tax-exempt status. See 426 U.S. at 28-33, 40-41. The Court found it "purely speculative whether the denials of service specified in the complaint fairly can be traced to [the IRS's] 'encouragement' or instead result from decisions made by the hospitals without regard to the tax implications." *Id.* at 42-43. The Court likewise found it speculative whether invalidation of the revenue ruling would lead the hospitals to serve the plaintiffs, since it was "just as plausible" that the hospitals might elect to forgo the tax exemption in order to avoid the financial burden of increased charitable care. *Id.* at 43.

Similarly, in *Allen* v. *Wright*, *supra*, the Court held that parents of black children attending public schools lacked standing to challenge IRS policies concerning tax exemptions for racially discriminatory private schools. The parents alleged, *inter alia*, that federal tax exemptions for discriminatory private schools "impair[ed] their

ability to have their public schools desegregated." 468 U.S. at 752-753. The Court concluded, however, that the plaintiffs' alleged injury was "not fairly traceable to the Government conduct * * * challenge[d] as unlawful." *Id.* at 757. The Court also found it "entirely speculative" whether withdrawal of a tax exemption would lead any particular discriminatory school to change its policies and whether any such change in policy would lead any given parent to transfer his or her child to public school. *Id.* at 758. In *Allen*, as in *Simon*, the inescapably speculative nature of a third party's response (if any) to changes in federal tax laws prevented the plaintiffs from establishing the necessary causal connection between the asserted illegality and any injury to themselves.

The district court sought to distinguish *Simon* and *Allen* on the ground that in those cases "there was arguably some disincentive to the institutions' taking advantage of the tax benefit" in question. J.S. App. 20a. In this case, by contrast, the district court believed that there would be no "'cost' to the selling processors and refiners in taking advantage of the tax benefits that section 968 would offer." *Ibid.* That reasoning is unsound. The tax benefits provided by Section 968 are contingent on a processor's decision to sell facilities in the first place, when in fact any given processor might have no interest in doing so. Because the likely tax treatment of any capital gain is only one of many factors bearing on a processor's decision whether to undertake a particular transaction, the effect (if any) of Section 968 on the general availability of processing facilities is inherently speculative. It is also uncertain whether any sales facilitated by Section 968 would be made to appellees, and whether the seller in any such transaction would choose to share any resulting tax benefits with the purchaser rather than to retain those profits for itself.

2. Appellees allege that the cancellation of Section 968 has already injured them by "interfering" with plans to acquire a specific processing facility. J.A. 15-16, 112-114.

They allege that, in anticipation of the enactment of Section 968, they had entered into discussions with the principal owner of a corporation named Idaho Potato Packers (IPP) regarding the "possibility" that Snake River "might" purchase an IPP processing facility in a transaction structured to defer the seller's recognition of capital gains. J.A. 112. According to the appellees, IPP "expressed an interest" in such a transaction, and Snake River "anticipated" that it would complete the transaction if Section 968 were enacted. J.A. 112, 16. Appellee Cranney stated that the cancellation of Section 968 "caused me to terminate discussions with" IPP because it was "clear" to Cranney that IPP would demand a higher price and "might" be unwilling to sell at "any acceptable price" without the tax benefit created by Section 968. J.A. 114. Cranney also stated that he "believe[s]" that IPP "remains interested" in a deferred-recognition sale. J.A. 114-115.

Appellees' vague and conclusory allegations fall well short of establishing that the sale discussed by Snake River and IPP would have been consummated if Section 968 had not been cancelled. Indeed, the district court declined to "speculate" whether the possible transaction with IPP "would have been brought to fruition but for the President's cancellation of section 968, or even if that particular deal would have satisfied the requirements of section 968." J.S.App. 21a.[13] "Prior decisions of this Court

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[13] For several reasons, it is far from clear that the transaction described by appellee Cranney would actually have enabled IPP to defer recognition of its capital gain pursuant to Section 968. First, a seller could have qualified for deferred recognition of capital gains under Section 968 only if it had purchased more than 50 percent of its agricultural products from the purchasing cooperative or the cooperative's members during the year preceding the sale. See J.S. App. 73a. Cranney's declaration, however, alleges only that IPP "acquired more than 50% of [its] potatoes from members *and farmers eligible to become members* of Snake River" during the preceding year. J.A. 112 (emphasis added). The purchase of products from farmers who

establish that unadorned speculation will not suffice to invoke the federal judicial power." *Simon*, 426 U.S. at 44.[14]

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were merely *eligible* to become members of a cooperative would not have satisfied the statutory requirement.

Second, appellees assert that IPP would have carried out the proposed transaction by "plac[ing] the [processing] facility in a wholly owned subsidiary, which IPP would then sell to Snake River." J.A. 113. Since it apparently was proposed that Snake River would purchase the stock of the subsidiary, the proposed transaction would not have qualified under Section 968 unless and until the subsidiary (rather than IPP) had purchased 50 percent of its agricultural products from Snake River and its members "during the 1-year period ending on the date of the sale." J.S. App. 73a. Thus, the transaction could not have taken place for at least one year after the transfer of the facility to the subsidiary, which presumably has yet to occur, and it is a matter of speculation whether or when the subsidiary would be able to satisfy the 50 percent requirement.

Finally, the very act of transferring the facility from IPP to a wholly owned subsidiary might have required IPP to recognize the capital gain immediately, making the applicability of Section 968 to the subsequent transfer to Snake River worthless. Although the placement of assets into a newly formed subsidiary is ordinarily a nontaxable event, see 26 U.S.C. 351, that rule does not apply if the contribution of assets is merely the initial step of a prearranged and integrated transaction designed to result in the sale of the assets to a third party. See, *e.g.*, Rev. Rul. 70-140, 1970-1 C.B. 73; *Intermountain Lumber Co.* v. *Commissioner*, 65 T.C. 1025 (1976).

[14] The district court's reliance (J.S. App. 18a) on *Bryant* v. *Yellen*, 447 U.S. 352 (1980), is misplaced. *Bryant* involved Section 46 of the Omnibus Adjustment Act of 1926, which limited federal water deliveries to 160 acres per owner and provided that any sale of excess acreage be at prices that did not reflect the value added by the availability of water from the reclamation project. See 447 U.S. at 360, 367 n.17. This Court held that a group of farm workers who wished to purchase land in the Imperial Valley of California had standing to seek a declaratory judgment that all private farm land in the Valley was subject to Section 46. See 447 U.S. at 366-368. The law at issue in *Bryant*, by making the continued availability of federal water deliveries contingent upon the owner's sale of any excess acreage at below-market prices, exerted a "determinative or coercive effect," *Bennett*, 117 S. Ct. at 1164, upon owners of excess lands to sell their land, and to do so at prices substantially below its market value. See *Bryant*, 447 U.S. at 367 (noting, with apparent approval, the court of appeals' conclusion

Appellees have also failed to adduce facts demonstrating that IPP or any other processor in fact still wishes to pursue a transaction with them, or that appellees' injury could be redressed by a declaration in this case that the cancellation was invalid. See *Warth*, 422 U.S. at 507 (plaintiffs' reliance on the remote possibility, unsubstantiated by allegations of fact, that their situation might improve were the Court to afford relief held to be insufficient to confer standing). Compare *Spencer* v. *Kemna*, No. 96-7171 (Mar. 3, 1998) (court lacks jurisdiction to consider claim of prior illegality where change in circumstances prevents the entry of meaningful relief); *Steel Co.* v. *Citizens for a Better Envt.*, No. 96-643 (Mar. 4, 1998), slip op. 25; *Los Angeles* v. *Lyons*, 461 U.S. 95, 105 (1983).[15]

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that "it would be highly improbable that all owners of excess lands would prefer to withdraw their irrigable lands from agriculture in order to avoid § 46"). Section 968, by contrast, would leave owners of agricultural processing facilities free either to retain ownership of those facilities without suffering any adverse consequences in their ongoing operations, or (if they chose to sell) to decline to share their tax benefits with the purchaser.

[15] The justiciability problem in this case is underscored by the difficulties inhering in the nature and scope of the relief awarded. Although the district court entered a declaratory judgment that the Line Item Veto Act is unconstitutional, J.S. App. 32a-33a, that declaratory judgment has binding effect only between appellees Snake River and Cranney on the one hand and the federal appellants on the other. See *United States* v. *Mendoza*, 464 U.S. 154 (1984). The district court's judgment in this one case does not render the Line Item Veto Act (or even the President's cancellation of the limited tax benefit conferred by Section 968) invalid as against the world at large. As a result, if at some point in the future Snake River were to purchase a processing facility in a transaction that would otherwise comply with Section 968, the United States would not be required by the district court's judgment in this case to accord the *seller* in that hypothetical future transaction the special tax benefits conferred by Section 968. The United States could be required to do so only if appellees Snake River and Cranney were entitled, in bringing this suit at the present time, to rely for their claim of injury, causation and redressability on the possible tax advantages that might accrue to any member of the class of *all* potential future sellers of processing facilities to Snake River.

This Court should be particularly reluctant to assume that the postulated chain of events would actually have occurred, or that invalidation of the challenged cancellation would enable appellees to purchase processing facilities, in light of the fact that IPP itself has declined to challenge the cancellation. Indeed, appellees have failed to submit any direct evidence (such as an affidavit from an IPP official) regarding the effect (if any) of the challenged cancellation on IPP's willingness to consummate the transaction.

3. The district court also held that the challenged cancellation subjected appellees to an "immediate" injury by depriving them of the ability to compete on an "equal footing" with investor-owned businesses. J.S. App. 15a-17a. The district court interpreted this Court's decision in *Northeastern Florida Chapter of Associated General Contractors* v. *City of Jacksonville*, 508 U.S. 656 (1993), to stand for the proposition that "the inability to compete on an equal basis in the bidding process is injury in fact." J.S. App. 16a.[16]

That sort of proceeding—which is in substance a request for an advisory opinion regarding the tax consequences for other persons of a hypothetical future transaction—is far removed from the "cases and controversies of the sort traditionally amenable to and resolved by the judicial process." *Steel Co.*, slip op. 17.

[16] In concluding that the cancellation of Section 968 deprived appellees of the opportunity to compete "on equal footing with investor-owned businesses," the court observed that investor-owned businesses, unlike farmers' cooperatives, can "structure acquisitions of processing facilities as tax-deferred stock-for-stock exchanges." J.S. App. 16a; see note 4, *supra*. An investor-owned business's earnings from the operations of a processing facility, however, are taxed twice: once at the corporate level, and a second time after profits are distributed to shareholders. The Code establishes a different regime for farmers' cooperatives, under which income generally is taxed only when it reaches the farmers. See 26 U.S.C. 521, 1381, 1382. Even after the cancellation of the tax benefits conferred by Section 968, that advantage counterbalances the investor-owned business's ability to undertake a stock-for-stock exchange.

The court's reliance on *Northeastern Florida* is misplaced. The plaintiff in *Northeastern Florida* asserted that its members had been denied the opportunity to bid on certain government contracts on the basis of race, in violation of the Equal Protection Clause. See *id.* at 658-659. The Court held that the plaintiffs could establish standing without alleging that they would have obtained particular contracts if the challenged discrimination had not occurred. See *id.* at 666 ("The 'injury in fact' in an equal protection case of this variety is the denial of equal treatment resulting from the imposition of the barrier, not the ultimate inability to obtain the benefit."). Appellees, by contrast, have not asserted an equal protection claim. Nor do they contend that the challenged cancellation has directly imposed any burden upon them. Their challenge is instead directed at the purportedly unlawful denial of favorable tax treatment to *other* private parties. Nothing in *Northeastern Florida* suggests that such a challenge is cognizable by a federal court.

II. THE LINE ITEM VETO ACT IS CONSTITUTIONAL

A. Cancellation Of Tax Or Spending Items Pursuant To The Line Item Veto Act Is Consistent With The Constitutional Requirement That The President "Sign" Or "Return" A Presented Bill *In Toto*

The Presentment Clause of Article I requires that "[e]very Bill" passed by Congress "shall, before it become a Law, be presented to the President." Art. I, § 7, Cl. 2.[17]

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[17] Article I, Section 7 actually has two Presentment Clauses: Clause 2, which applies to "Bill[s]," and Clause 3, which applies to all "Order[s], Resolution[s], or Vote[s] to Which The Concurrence of the Senate and House of Representatives may be necessary." Clause 3 was adopted to prevent evasion of the presentment requirement "by the simple expedient of calling a proposed law a 'resolution' or 'vote' rather than a 'bill.'" *INS* v. *Chadha*, 462 U.S. 919, 947 (1983). For the sake of simplicity, we refer exclusively to Clause 2 in the text, but the discussion applies equally to both Presentment Clauses.

When a bill is presented to the President, the Presentment Clause gives him two options: if he "approve[s]" the bill, "he shall sign it," and if he does not approve the bill, "he shall return it, with his Objections to that House in which it shall have originated."[18] As the district court recognized, see J.S. App. 26a, the President is required to sign or return a presented bill *in toto*; he is not empowered to sign some portions of the bill and return others.

The Line Item Veto Act is consistent with that requirement. Its title notwithstanding, the Act does not authorize the President to sign into law some provisions of an appropriations bill while "returning" other provisions to Congress.[19] By its terms, the Act applies only to "bill[s] or joint resolution[s] that ha[ve] been signed into law pursuant to Article I, section 7, of the Constitution of the United States." 2 U.S.C. 691(a) (Supp. II 1996). When the President signs a tax or spending bill, "[the] bill when so signed becomes from that moment a law." *La Abra Silver Mining Co.* v. *United States*, 175 U.S. 423, 454 (1899); *United States* v. *Will*, 449 U.S. 200, 224-225 & n.29 (1980) (President's signature marks "the precise time the statute became law"). Thus, the President's cancellation authority under the Act comes into existence only *after* the requirements of the Presentment Clause have been satisfied. See H.R. Conf. Rep. No. 491, 104th Cong., 2d Sess. 20 (1996) ("[T]he cancellation authority only becomes effective after the President has exercised the

[18] If the President neither signs the bill nor returns it within 10 days, the bill "shall be a Law, in like Manner as if he had signed it," unless Congress has by its adjournment prevented the bill's return, in which case the bill "shall not be a Law." Art. I, § 7, Cl. 2; see generally *The Pocket Veto Case*, 279 U.S. 655 (1929).

[19] Although the word "veto" is commonly used to describe the President's power to "return" a disapproved bill to the House of Congress in which it originated, see *Chadha*, 462 U.S. at 925, the word "veto" does not appear in the Presentment Clause, or anywhere else in the Constitution. The presence of the term in the title of the Act has the same constitutional significance as the absence of the term from the Presentment Clause—none.

constitutional authority to enact legislation in its entirety.").[20]

In recent years, Presidents have regularly been compelled to make all-or-nothing decisions to accept or reject large combinations of multifarious spending items. The need for such choices is not, however, the inevitable consequence of the constitutional requirement that the President sign or return a presented bill *in toto*. Rather, such decisions have been necessitated by the *in toto* requirement *in conjunction with* the recent congressional practice of (1) routinely combining numerous and diverse spending items in a single bill, and (2) sharply restricting the President's authority to decline to spend appropriated funds. Congress may not, of course, alter the requirements of the Presentment Clause. It may, however, quite legitimately take into account the practical impact of those requirements in determining what types of bills it will pass.[21] The effect of the Line Item Veto Act is to vest the President with greater discretion than he would otherwise possess in the administration of federal spending and tax laws *after* they are enacted. The Act

[20] A bill returned to Congress can be enacted into law if, but only if, it is subsequently approved by two-thirds of each House. U.S. Const. Art. I, § 7, Cl. 2. A presidential cancellation pursuant to the Line Item Veto Act, by contrast, can be overturned by new legislation passed by a simple majority of each House, see 2 U.S.C. 691d (Supp. II 1996), subject to a possible presidential veto and subsequent override. That is the method that Congress is required to employ whenever it disapproves of the manner in which the Executive Branch has exercised discretionary authority conferred by Act of Congress. See *Chadha*, 462 U.S. at 954-955, 958.

[21] Lump-sum appropriations laws, for example, are clearly consistent with the requirement that the President must sign or return a bill in its entirety. Alternatively, Congress might (at least in theory) adopt the practice of voting separately upon each line item, thus causing each item of spending to be passed as a separate bill, which the President could "sign" or "return." Such a practice would clearly be constitutional, yet it would vest the President with discretion functionally comparable to that which he possesses under the Line Item Veto Act.

thus enhances the President's role in the fashioning of national fiscal policy, while remaining faithful to the procedural requirements of Article I.

B. Cancellation Of Tax Or Spending Items Pursuant To The Line Item Veto Act Does Not Effect An Amendment Or Repeal Of Any Enacted Law

The district court acknowledged that "the initial passage of the Balanced Budget Act and the Taxpayer Relief Act complied with the Article I requirements" that an enacted law must be passed by both Houses of Congress and approved, in its entirety, by the President. J.S. App. 24a. The court asserted, however, that

> the Line Item Veto Act then authorized the President to violate those requirements by producing laws that had not adhered to those requirements. Both Houses of Congress, through a process of discussion and compromise, had agreed upon the exact content of the Balanced Budget Act and the Taxpayer Relief Act. These laws reflected the best judgment of both Houses. The laws that resulted after the President's line item veto were different from those consented to by both Houses of Congress. There is no way of knowing whether these laws, in their truncated form, would have received the requisite support from both the House and the Senate. Because the laws that emerged after the Line Item Veto are not the same laws that proceeded through the legislative process, as required, the resulting laws are not valid.

Id. at 24a-25a. The court's analysis reflects a fundamental misunderstanding of the relationship between the Line Item Veto Act and subsequent tax and spending laws.

1. Although Article I vests "[a]ll legislative Powers" in Congress (Art. I, § 1), it "do[es] not prevent Congress from obtaining the assistance of its coordinate Branches." *Mistretta* v. *United States*, 488 U.S. 361, 371-372 (1988). This Court has long recognized that "no valid objection can be made" to statutory provisions "conferring authority or discretion" on the President regarding the execution of federal laws. *Field* v. *Clark*, 143 U.S. 649, 693-694 (1892); accord, *e.g.*, *Touby* v. *United States*, 500 U.S. 160, 165 (1991).[22] The Constitution does not require that Congress vote to approve the specific discretionary policy choices made by Executive Branch officials pursuant to a general statutory grant of authority. See *Chadha*, 462 U.S. at 953 n.16 (the lawmaking procedures required by the Presentment Clause are "not necessary as a check on the Executive's administration of the laws because his administrative activity cannot reach beyond the limits of

[22] In *Field*, importers challenged the constitutionality of a section of the Tariff Act of 1890 that authorized the President to "suspend" the Act's provisions (thereby raising tariffs) if the President determined that foreign governments were imposing "reciprocally unequal and unreasonable" tariffs on specified commodities. Act of Oct. 1, 1890, ch. 1244, § 3, 26 Stat. 612. The importers argued that the suspension provision unconstitutionally delegated lawmaking power to the President. 143 U.S. at 681. The Court rejected that contention. It noted that the President's power to suspend the provisions of the 1890 Act "was a part of the law itself as it left the hands of Congress," and explained that "[t]he true [constitutional] distinction * * * is between the delegation of power to make the law * * * and conferring authority or discretion as to its execution, to be exercised under and in pursuance of the law." *Id.* at 693-694 (internal quotation marks omitted).

The Court has also sustained the related congressional practice of vesting the Executive Branch with discretionary authority to create exemptions from federal laws or otherwise limit their scope. For example, the former Interstate Commerce Act, while generally prohibiting carriers from offering long-haul discounts, "gave an authority to the Interstate Commerce Commission * * * to grant relief from this prohibition," authority that was "undefined except as the general purposes of that Act implied the basis for affording exemption." *Addison* v. *Holly Hill Fruit Prods., Inc.*, 322 U.S. 607, 616 (1944). In the *Intermountain Rate Cases*, 234 U.S. 476, 486-489 (1914), the Court squarely rejected a claim that Congress had conferred Article I legislative power on the Executive Branch by authorizing the Commission to create exemptions from the long-haul discount prohibition.

the statute that created it—a statute duly enacted pursuant to Art. I, §§ 1, 7").[23]

Contrary to the district court's suggestion, the Line Item Veto Act does not authorize the President to amend or repeal subsequent tax or spending laws. The Act simply establishes a "default rule," cf. *Landgraf* v. *USI Film Prods.*, 511 U.S. 244, 272 (1994), that defines the extent of the President's discretion in the administration of such measures in the absence of an express contrary provision contained in a particular law. Congress retains the power to render the Act's provisions inapplicable, or otherwise to alter the scope of the President's authority, with respect to any particular bill. See *Raines*, 117 S. Ct. at 2320 (Congress may "exempt a given appropriations bill (or a given provision in an appropriations bill) from the Act"). Because Congress is presumed to legislate with an awareness of existing law, see, *e.g.*, *Miles* v. *Apex Marine Corp.*, 498 U.S. 19, 32 (1990); *Goodyear Atomic Corp.* v. *Miller*, 486 U.S. 174, 184-185 (1988), a spending or tax bill that does not otherwise specify the scope of the President's discretion must be understood to authorize him either to implement, or to cancel, each item covered by the Line Item Veto Act.

[23] The district court asserted that "[t]here is no way of knowing whether" Congress would have passed the Balanced Budget and Taxpayer Relief Acts if it had foreseen the manner in which the President would exercise his cancellation authority. J.S. App. 24a. It is possible, of course, that some Members of Congress who voted for those laws would not have done so if they had foreseen that particular items they favored would be cancelled. But it is also possible that other Members supported the Balanced Budget and Taxpayer Relief Acts *only* because they understood that the President retained the power to cancel spending and tax items that he believed to be unwarranted. Such speculation is irrelevant, however, to the legal issues presented by this case. The validity of Executive Branch conduct does not depend upon a showing that Congress considered and approved the specific policy determinations underlying the President's execution of the laws. Indeed, this Court has recognized that Executive Branch officials may appropriately be vested with discretionary "policymaking responsibilities" where "Congress [i]s unable to forge a coalition on either side of the question, and those on each side decide[] to take their chances with the agency." *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837, 865 (1984).

A plaintiff who has been injured by the cancellation of a tax or spending item is always free to argue that the cancellation was unauthorized by law, either because the item in question was not cancellable under the terms of the Line Item Veto Act, or because the particular budgetary law in which that item was contained divested the President of the cancellation authority that he would otherwise have possessed. Appellees have not made either of those contentions. Rather, they have (implicitly) acknowledged that the Balanced Budget and Taxpayer Relief Acts, read (as those Acts must be) against the backdrop of existing law, authorized the cancellations at issue in this case. In light of that concession, the President's exercise of cancellation authority cannot be said to have created laws "different from those consented to by both Houses of Congress." J.S. App. 24a.

There is consequently no basis for the district court's conclusion that the cancellations at issue in this case subverted the will of Congress. The possibility that individual items would be cancelled was an integral feature of both the Balanced Budget Act and the Taxpayer Relief Act at the moment of their passage.[24] When the President undertook the cancellations at issue here, he neither repealed nor amended the underlying spending and tax

[24] The possibility of cancellation was implicit in the Balanced Budget Act, since the Act contained numerous sections (including Section 4722(c)) providing for "item[s] of new direct spending" within the meaning of the Line Item Veto Act. The possibility of cancellation was an *explicit* feature of the Taxpayer Relief Act. Section 1701 of that Act contained an "identification of limited tax benefits subject to line item veto." 111 Stat. 1099; see note 2, *supra*. Section 968 of the Act was listed among those provisions. 111 Stat. 1101. Thus, while the district court was correct in stating that "[b]oth Houses of Congress * * * agreed upon the exact content of * * * the Taxpayer Relief Act," J.S. App. 24a, part of that "content" was a provision expressly identifying Section 968 as an item "subject to line item veto."

laws; he administered them in accordance with their terms.

2. The district court found it significant (see J.S. App. 25a-26a) that cancellation under the Act "rescind[s]" discretionary budget authority and renders items of new direct spending and limited tax benefits without "legal force or effect." 2 U.S.C. 691e(4)(A)-(C) (Supp. II 1996). This Court, however, has discussed with approval statutory provisions phrased in similar terms. In *Field*, for example, the Court cited a customs statute providing that specified tariff acts "shall be repealed" if the President declared that discriminatory foreign tariffs had been abolished, see 143 U.S. at 687 (citing Act of May 31, 1830, ch. 219, § 2, 4 Stat. 425), and an import statute authorizing the President to "declare the provisions of this act to be inoperative, and the same shall be afterwards inoperative and of no effect from and after thirty days from the date of said proclamation," *id.* at 688 (citing Act of Mar. 6, 1866, ch. 12, § 2, 14 Stat. 3). Far from regarding those laws as constitutionally deficient, the Court cited them as historical support for the constitutionality of the tariff act at issue in *Field*. See also 28 U.S.C. 2072(b) ("All laws in conflict with" rules of practice and procedure promulgated by this Court "shall be of no further force or effect after such rules have taken effect."); *Sibbach* v. *Wilson & Co.*, 312 U.S. 1, 10 (1941); *Henderson* v. *United States*, 116 S. Ct. 1638, 1644 (1996); *Synar* v. *United States*, 626 F. Supp. 1374, 1387 (D.D.C. 1986), aff'd on other grounds, *Bowsher* v. *Synar*, 478 U.S. 714 (1986).

In any event, the constitutional analysis in this case should turn on the *substance* of the powers vested in the President by the Line Item Veto Act. The President's authority to "cancel" tax and spending items is, in practical effect, no more and no less than the power to "decline to spend" specified sums of money, or to "decline to implement" specified tax measures. If (as we argue above) such power is in substance a permissible form of discretionary administrative authority, Congress's use of infelicitous terminology cannot transform the cancellation into an unconstitutional amendment or repeal of an enacted law. See *Metropolitan Washington Airports Authority* v. *Citizens for the Abatement of Aircraft Noise*, 501 U.S. 252, 267 (1991) ("separation-of-powers analysis does not turn on the labeling of an activity") (quoting *Mistretta*, 488 U.S. at 393); *Dames & Moore* v. *Regan*, 453 U.S. 654, 675 n.7 (1981).

3. The district court also sought to distinguish the Line Item Veto Act from prior laws vesting the Executive Branch with administrative discretion, on the ground that the President's cancellation of a particular item under the Line Item Veto Act is irrevocable unless overturned by a subsequent disapproval bill. J.S. App. 30a. Executive Branch officials will often be required, however, to make irrevocable decisions within limited periods of time. The opportunity to pursue litigation on behalf of the government, for example, may be lost if the responsible executive officials fail to initiate a suit, or to file a notice of appeal, within the time set by statute. See, *e.g.*, *FEC* v. *NRA Political Victory Fund*, 513 U.S. 88, 98-99 (1994). There is consequently no basis for the district court's apparent conclusion that the freedom to change course is an essential attribute of the President's execution of the laws.

There is also no basis for supposing that the irrevocability of a cancellation increases the President's authority or threatens the separation of powers. To the contrary, the discretion conferred on the President by the Act is plainly *narrower* than would be the case if the President were authorized to revisit the question whether particular expenditures should be made. If "reversible" cancellation authority is constitutionally permissible, then irreversible authority is valid *a fortiori*.

C. The Line Item Veto Act Does Not Effect A Delegation Of Legislative Power To The President

Although Congress may vest the Executive Branch with considerable discretion in the administration of

federal laws, it may not confer discretion so broad and unconstrained as to amount, in practical effect, to the delegation of legislative power. See *Mistretta*, 488 U.S. at 419 (Scalia, J., dissenting). The Line Item Veto Act operates to make specified spending and revenue items discretionary, rather than mandatory, where the President finds that the Act's criteria have been met.[25] As we explain below, that grant of authority is fully consistent both with historical practice and with this Court's precedents.

1. ***The Line Item Veto Act is consistent with the historical understanding of Congress's power to confer spending discretion on the Executive Branch***

"Long settled and established practice is a consideration of great weight" in the adjudication of constitutional questions. *The Pocket Veto Case*, 279 U.S. 655, 689 (1929); see also *Mistretta*, 488 U.S. at 401 ("'traditional ways of conducting government * * * give meaning' to the Constitution") (quoting *Youngstown Sheet & Tube Co.* v. *Sawyer*, 343 U.S. 579, 610 (1952) (Frankfurter, J., concurring)). As we explain above, the conferral upon the President of substantial discretion over the expenditure of appropriated funds has been a recurring practice of Congress under the Spending Clause from the beginning of the Republic. See pp. 2-5, *supra*; *Cincinnati Soap Co.* v.

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[25] In discussing the effect of the Act on spending bills, we use the terms "discretionary" and "mandatory" to distinguish between spending authority that the Executive Branch has discretion not to exercise and spending authority that the Executive Branch is legally obligated to exercise. Those terms are often used in a different sense in the federal budget process: "discretionary" spending signifies "programs that are subject to annual funding decisions in the appropriations process," while "mandatory" spending (also known as "direct" spending) means "all spending that is made pursuant to laws other than appropriations laws." Senate Comm. on the Budget, 104th Cong., 2d Sess., *The Congressional Budget Process: An Explanation* 5, 6 (Comm. Print 1996).

United States, 301 U.S. 308, 322 (1937) ("Appropriation and other acts of Congress are replete with instances of general appropriations of large amounts, to be allotted and expended as directed by designated governmental agencies.").

Congress has sometimes conferred that discretion in individual appropriations acts. At other times, Congress has given the President broad authority to withhold appropriated funds on a government-wide basis in order to pursue overarching budgetary goals of Congress's choosing. See pp. 3-5, *supra*. When Congress has given the President discretion over appropriated funds, it often has chosen not to impose binding restrictions on how that discretion is to be exercised. Thus, when Congress has passed lump-sum appropriations bills, see *Lincoln* v. *Vigil*, 508 U.S. 182, 192 (1993), or when it has given the President general authority to reduce government spending below appropriated levels, see pp. 3-5, *supra*, the President has been left largely free to exercise his own judgment regarding which spending programs to reduce and how much to reduce them. The degree of authority vested in the President has varied from time to time, in response to changing legislative judgments about the need for Executive Branch discretion. The extent of the Executive Branch's spending discretion has always been regarded, however, both by Congress and by the courts, as a matter for Congress itself to decide through the legislative process.

The practices of the First Congress regarding Executive Branch spending discretion are particularly instructive. Those acts "provide[] 'contemporaneous and weighty evidence' of the Constitution's meaning since many of the Members of the First Congress 'had taken part in framing that instrument.'" *Bowsher* v. *Synar*, 478 U.S. at 723-724 (quoting *Marsh* v. *Chambers*, 463 U.S. 783, 790 (1983)). As we explain above (see pp. 2-3, *supra*), the First Congress chose to fund the general operations of the federal government through lump-sum appropriations acts that

did not require the Executive Branch to spend the full amount of the appropriations.[26] The Members of the First Congress evidently saw no constitutional impediment to vesting the Executive Branch with broad discretion over the disposition of appropriated funds.

Viewed against this historical background, the Line Item Veto Act is hardly revolutionary. Like its many statutory predecessors, the Act simply gives the President a measure of discretion over the expenditure of appropriated funds, discretion that may be exercised only in accordance with the procedural and substantive limitations Congress has seen fit to impose. In sum, the settled historical practices of Congress and the Executive Branch regarding spending discretion add "great weight," *The Pocket Veto Case*, 279 U.S. at 689, to the political Branches' shared judgment that the Line Item Veto Act satisfies the requirements of Article I. Cf. *Dames & Moore*, 453 U.S. at 668 ("When the President acts pursuant to an express or implied authorization from Congress, he exercises not only his powers but also those delegated by Congress," and his actions are "supported by the strongest of presumptions and the widest latitude of judicial interpretation") (internal quotation marks omitted).

2. *The Line Item Veto Act is consistent with this Court's precedents applying the nondelegation doctrine*

a. In applying the nondelegation doctrine, this Court "has deemed it 'constitutionally sufficient if Congress clearly delineates the general policy, the public agency which is to apply it, and the boundaries of th[e] delegated

[26] The lump-sum appropriations passed by the First Congress did not vest the President with unlimited discretion over the use of the appropriated sums. Other statutes, such as those fixing the salaries of federal officers, effectively required the expenditure of a portion of the appropriations in specified ways. See, *e.g.*, Act of Sept. 11, 1789, ch. 13, §§ 1-2, 1 Stat. 67-68 (salaries of executive officers). Nevertheless, Congress otherwise left the President free to decide how (and whether) to spend the funds.

authority.'" *Mistretta*, 488 U.S. at 372-373 (quoting *American Power & Light Co.* v. *SEC*, 329 U.S. 90, 105 (1946)). The touchstone of analysis is whether Congress has provided an "intelligible principle" for the exercise of executive discretion. *Mistretta*, 488 U.S. at 372; *J.W. Hampton Jr. & Co.* v. *United States*, 276 U.S. 394, 406 (1928). Applying the "intelligible principle" standard, the Court has repeatedly approved grants of discretionary authority "under [statutory] standards phrased in sweeping terms," *Loving* v. *United States*, 116 S. Ct. 1737, 1750 (1996), sustaining the constitutionality of laws giving Executive Branch officials the authority to regulate broadcast licensing as required by "public interest, convenience, or necessity," *NBC* v. *United States*, 319 U.S. 190, 194, 225-226 (1943); to approve consolidation of carriers "in the public interest," *New York Central Securities Corp.* v. *United States*, 287 U.S. 12, 24 (1932); to recover "excessive profits" on military contracts, *Lichter* v. *United States*, 334 U.S. 742, 778-786 (1948); to fix prices that "will generally be fair and equitable and will effectuate the purposes" of the law, *Yakus* v. *United States*, 321 U.S. 414, 420, 426-427 (1944); and to determine "just and reasonable" natural gas rates, *FPC* v. *Hope Natural Gas Co.*, 320 U.S. 591, 600 (1944).[27]

b. This Court has observed that "certain categories of administrative decisions * * * traditionally have [been] regarded as 'committed to agency discretion.'" *Lincoln*, 508 U.S. at 191. "The allocation of funds from a lump-sum appropriation is" one such decision, since "a fundamental principle of appropriations law is that where Congress merely appropriates lump-sum amounts without statutorily restricting what can be done with those funds, a clear inference arises that it does not intend to impose

[27] See also, *e.g.*, *Touby*, *supra*; *Skinner* v. *Mid-America Pipeline Co.*, 490 U.S. 212 (1989); *Mistretta*, *supra*; *FEA* v. *Algonquin SNG, Inc.*, 426 U.S. 548 (1976); *American Power & Light Co.*, *supra*; *J.W. Hampton*, *supra*; *Field*, *supra*; *Synar* v. *United States*, 626 F. Supp. at 1383-1384.

legally binding restrictions." *Id.* at 192 (internal quotation marks omitted). Lump-sum appropriations have been used throughout the Nation's history, and their constitutionality "has never been seriously questioned." *Cincinnati Soap Co.*, 301 U.S. at 322. So long as the activities on which appropriated funds are spent are themselves authorized by law, and so long as the Executive Branch adheres to the constitutional directive that "[n]o Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law," Art. I, § 9, Cl. 7; see *OPM* v. *Richmond*, 496 U.S. 414, 424-425 (1990), we believe that no constitutional infirmity would exist even if the pertinent statutory provisions placed no further constraints on Executive Branch discretion.

c. In any event, the Line Item Veto Act places meaningful constraints on the President's decision whether to spend, or to cancel, individual items covered by the Act. To begin with, the Act permits the President to cancel items only "in whole," 2 U.S.C. 691(a), not in part, thereby requiring him to make "an all or nothing decision." H.R. Conf. Rep. No. 491, *supra*, at 33. And because the Act's "lockbox" feature (see p. 7, *supra*) requires that any cancelled amounts be devoted to deficit reduction, there is no authority to divert cancelled funds for other purposes. The Act's requirement that each budgetary item must be devoted either to a congressionally defined purpose or to deficit reduction is itself a substantial limitation on the President's discretion.

In addition, the Act provides significant guidance to the President in his choice between those two alternatives. The Act permits the President to cancel particular spending and revenue items only if he determines that cancellation will "(i) reduce the Federal budget deficit; (ii) not impair any essential Government functions; and (iii) not harm the national interest." 2 U.S.C. 691(a)(A) (Supp. II 1996). The Act thereby "establishes clear preconditions to Presidential action," *FEA* v. *Algonquin SNG, Inc.*, 426 U.S. 548, 559 (1976), using criteria that are at least as

"intelligible" as those previously approved by this Court. See pp. 44-45 & note 27, *supra*.

The Act also requires the President to consider "the legislative history, construction, and purposes of the law which contains the" cancelled items, as well as "any specific sources of information referenced in such law"; to provide his estimate of the "fiscal, economic, and budgetary effect" of the cancellation; to estimate the "effect of the cancellation upon the objects, purposes and programs for which the canceled authority was provided"; and to set forth the geographic distribution of the cancelled spending. 2 U.S.C. 691(b), 691a(b) (Supp. II 1996). The requirement that the President articulate his assessment of the pertinent criteria provides an additional safeguard against arbitrary action. Cf. *Motor Vehicle Mfrs. Ass'n* v. *State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983).

Finally, the Act places a substantial portion of the federal budget outside the scope of the President's cancellation authority altogether, by excluding spending for entitlement programs and other "direct spending" that results from previously-enacted laws. See 2 U.S.C. 691e(8) (Supp. II 1996) ("item of new direct spending" defined as "any specific provision of law that is estimated to result in an *increase* in budget authority or outlays for direct spending" over the budgetary "baseline") (emphasis added); note 1, *supra*. Because "Congress [has] clearly delineate[d] the general policy, the public agency which is to apply it, and the boundaries of th[e] delegated authority," *Mistretta*, 488 U.S. at 372-373 (internal quotation marks omitted), the President's cancellation authority under the Act represents the Article II power to execute the laws of the United States, not the legislative power vested in Congress by Article I.

d. The district court regarded the President's cancellation of limited tax benefits as especially problematic.

See J.S. App. 30a.[28] However, the cancellation of limited tax benefits is also a form of discretionary administrative authority, not a form of statutory repeal. This Court has held that "the delegation of discretionary authority under Congress' taxing power is subject to no constitutional scrutiny greater than that [the Court] ha[s] applied to other nondelegation challenges," *Skinner* v. *Mid-America Pipeline Co.*, 490 U.S. 212, 223 (1989), and Congress has frequently vested the President with discretionary authority over the imposition of taxes. See, *e.g.*, *J.W. Hampton*, 276 U.S. at 405-410 (rejecting nondelegation challenge to "flexible tariff" provisions of Tariff Act of 1922); *Field* v. *Clark*, 143 U.S. at 682-693 (rejecting nondelegation challenge to similar provision of Tariff Act of 1890 and citing many similar statutes).

Under the Line Item Veto Act, the President's authority to cancel limited tax benefits is governed by "intelligible principles." See pp. 46-47, *supra*. And because the provisions subject to cancellation will affect very small numbers of taxpayers, see 2 U.S.C. 691e(9)(A) (Supp. II 1996), the President has no wide-ranging authority to reshape the basic corpus of federal tax law. Cancellation of a limited tax benefit, moreover, does not subject the affected taxpayers to a special disadvantage; it simply ensures that

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[28] Even if the Act's provisions regarding limited tax benefits were found to be constitutionally deficient, that result would not affect the validity of the rest of the Act. "Unless it is evident that the Legislature would not have enacted those provisions which are within its power, independently of that which is not, the invalid part may be dropped if what is left is fully operative as a law." *Buckley* v. *Valeo*, 424 U.S. 1, 108 (1976) (per curiam) (internal quotation marks omitted). The Line Item Veto Act manifestly would remain "fully operative as a law" if the President's authority over limited tax benefits was stricken. And the mere absence of a severability provision in the Act does not makes it "evident" that Congress would not have enacted the remaining provisions of the Act without the limited tax benefit provisions. See *Alaska Airlines, Inc.* v. *Brock*, 480 U.S. 678, 686 (1987) ("the absence of a severability clause * * * does not raise a presumption against severability").

their tax liability is governed by the generally applicable requirements and prohibitions imposed by the remainder of the Internal Revenue Code. The cancellation at issue in *Snake River* is therefore fully consistent with this Court's precedents.

CONCLUSION

The judgment of the district court should be vacated and the case remanded with instructions to dismiss for lack of jurisdiction. Alternatively, the judgment of the district court should be reversed.

Respectfully submitted.

SETH P. WAXMAN
Solicitor General
FRANK W. HUNGER
Assistant Attorney General
EDWIN S. KNEEDLER
Deputy Solicitor General
MALCOLM L. STEWART
Assistant to the Solicitor General
DOUGLAS N. LETTER
SCOTT R. MCINTOSH
Attorneys

MARCH 1998

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Supreme Court, U.S.
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CLERK

No. 97-1374

In the Supreme Court of the United States

OCTOBER TERM, 1997

WILLIAM J. CLINTON, ET AL., APPELLANTS

v.

CITY OF NEW YORK, ET AL.

ROBERT E. RUBIN, APPELLANT

v.

SNAKE RIVER POTATO GROWERS, INC., ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

JOINT APPENDIX

SETH P. WAXMAN
Solicitor General
Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217
Counsel of Record for Appellants

LOUIS R. COHEN
Wilmer, Cutler & Pickering
2445 M Street, N.W.
Washington, D.C. 20037
(202) 663-6000
Counsel of Record for Appellees Snake River Potato Growers, Inc. et al.

Additional counsel listed inside

JURISDICTIONAL STATEMENT FILED: FEBRUARY 20, 1998
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134 pp

CHARLES J. COOPER
Cooper, Carvin & Rosenthal, PLLC
2000 K Street, N.W., Suite 401
Washington, D.C. 20006
(202) 822-8950
Counsel of Record for Appellees Greater New York Hospital Association and Jamaica Hospital Medical Center

JEFFREY D. FRIEDLANDER
Acting Corporation Counsel of the City of New York
LEONARD J. KOERNER*
ALAN G. KRAMS
DAVID B. GOLDIN
Assistant Corporation Counsels
City of New York Corporation Counsel
New York City Law Department
100 Church Street, Room 6-168
New York, NY 10007
(212) 788-1010
**Counsel of Record for Appellees City of New York and the New York City Health and Hospitals Corporation*

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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA
(WASHINGTON)

CIVIL DOCKET #: 97-CV-2393

THE CITY OF NEW YORK; CITY HALL
NEW YORK CITY HEALTH AND HOSPITALS CORP.
GREATER NEW YORK HOSPITAL ASSOCIATION
JAMAICA HOSPITAL MEDICAL CENTER
DISTRICT COUNCIL 37, AMERICAN FEDERATION
OF STATE, COUNTY AND MUNICIPAL EMPLOYEES
LOCAL 1199 NATIONAL HEALTH AND
HUMAN SERVICE EMPLOYEES UNION, PLAINTIFFS

V.

WILLIAM J. CLINTON, PRESIDENT
OF THE UNITED STATES OF AMERICA
DONNA E. SHALALA, SECRETARY OF
HEALTH AND HUMAN SERVICES
FRANKLIN D. RAINES,
DIRECTOR OF THE OFFICE OF MANAGEMENT AND
BUDGET, DEFENDANTS

THE CITY OF NEW YORK, CITY HALL
NEW YORK CITY HEALTH AND HOSPITALS CORP.
GREATER NEW YORK HOSPITAL ASSOCIATION
JAMAICA HOSPITAL MEDICAL CENTER
DISTRICT COUNCIL 37, AMERICAN FEDERATION
OF STATE, COUNTY AND MUNICIPAL EMPLOYEES
LOCAL 1199 NATIONAL HEALTH AND
HUMAN SERVICE EMPLOYEES UNION, PLAINTIFFS

V.

ROBERT C. BYRD, UNITED STATES SENATOR
DANIEL PATRICK MOYNIHAN,
UNITED STATES SENATOR
CARL LEVIN, UNITED STATES SENATOR
DAN BURTON
UNITED STATES SENATE, MOVANTS

DOCKET ENTRIES

1997

Oct. 16	(1)	COMPLAINT filed by plaintiff THE CITY OF NEW YORK, plaintiff NY CITY HEALTH/HOSP., plaintiff GREATER NY HOSP., plaintiff JAMAICA HOSP. MED., plaintiff DISTRICT COUNCIL 37, plaintiff LOCAL 1199, NATL.; attachment (1) (tth) [Entry date 10/17/97] [1:97cv2393]
		* * * * *
Oct. 21	__	CASE REASSIGNED from Judge Thomas P. Jackson to Judge Thomas F. Hogan (tth) [Entry date 10/22/97] [1:97cv2393]
		* * * * *
Oct. 24	(6)	ORDER by Judge Thomas F. Hogan : directing that Civil Actions 97-2399 and 97-2463 are consolidated with Civil Action 97-2393, for all purposes, before Judge Thomas F. Hogan. (N) (gew) [Entry date 10/27/97] [1:97cv2393]

		* * * * *
Nov. 12	(13)	MOTION filed by federal defendant WILLIAM J. CLINTON in 1:97-cv-02393, federal defendant DONNA E. SHALALA in 1:97-cv-02393, federal defendant FRANKLIN D. RAINES in 1:97-cv-02393, federal defendant USA in 1:97-cv-02399, federal defendant WILLIAM J. CLINTON in 1:97-cv-02399, federal defendant FRANKLIN D. RAINES in 1:97-cv-02399, federal defendant ROBERT E. RUBIN in 1:97-cv-02463 to dismiss complaint [1-1] in 1:97-cv-02463; Declaration (1). (lkn) [Entry date 11/13/97] [1:97cv2393 1:97cv2399 1:97cv2463]
		* * * * *
Nov. 26	(14)	MOTION filed by plaintiff SNAKE RIVER POTATO in 1:97-cv-02463, plaintiff MIKE CRANNEY in 1:97-cv-02463 for summary judgment; Appendix. (lkn) [Entry date 11/28/97] [1:97cv2393 1:97cv2399 1:97cv2463]
		* * * * *
)v. 26	(17)	MOTION filed by plaintiff in 1:97-cv-02393 for summary judgment; Appendix. (lkn) [Entry date 11/28/97] [1:97cv2393]
		* * * * *

Dec. 18	(32)	MOTION filed by federal defendant WILLIAM J. CLINTON in 1:97-cv-02393, federal defendant DONNA E. SHALALA in 1:97-cv-02393, federal defendant FRANKLIN D. RAINES in 1:97-cv-02393, federal defendant USA in 1:97-cv-02399, federal defendant WILLIAM J. CLINTON in 1:97-cv-02399, federal defendant FRANKLIN D. RAINES in 1:97-cv-02399, federal defendant ROBERT E. RUBIN in 1:97-cv-02463 for summary judgment (lkn) [Entry date 12/19/97] [1:97cv2393 1:97cv2399 1:97cv2463]

* * * * *

Dec. 31	__	JOINT MOTION by plaintiff in 1:97-cv-02399, federal defendant in 1:97-cv-02399, plaintiff in 1:97-cv-02399, federal defendant in 1:97-cv-02399 for order granting partial relief and otherwise dismissing action as moot (lkn) [Entry date 01/06/98] [1:97cv2399]

* * * * *

1998

Jan. 14	__	MOTION HEARING before Judge Thomas F. Hogan Reporter: Patricia J. Yerkes (gew) [Entry date 01/16/98] [1:97cv2393]

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Jan. 28	(42)	TRANSCRIPT filed for date(s) of 01/14/98. Reporter: Patricia J. Yerkes (lkn) [Entry date 01/29/98] [1:97cv2393]
Feb. 12	(43)	MEMORANDUM OPINION by Judge Thomas F. Hogan (N) (cjp)

* * * * *

Feb. 12	(44)	ORDER by Judge Thomas F. Hogan : directing that the Line Item Veto Act, Pub. L. No. 104-130, 110 Stat. (1996), is adjudged and declared unconstitutional; denying motion to dismiss complaint [1-1] in 1:97-cv-02463 [13-1] by federal defendant in 1:97-cv-02393, 1:97-cv-02463, denying motion for summary judgment [32-1] by federal defendant in 1:97-cv-02393, 1:97-cv-02463, granting motion for summary judgment [17-1] by plaintiff in 1:97-cv-02393, granting motion for summary judgment [14-1] by MIKE CRANNEY, SNAKE RIVER POTATO in 1:97-cv-02393, 1:97-cv-02463 (N) (cjp) [1:97cv2393 1:97cv2463]
Feb. 13	(45)	NOTICE OF APPEAL by federal defendant WILLIAM J. CLINTON in 1:97-cv-02393, federal defendant DONNA E. SHALALA in 1:97-cv-02393, federal defendant FRANKLIN D. RAINES in 1:97-cv-02393 to the U. S. Supreme

Court from order [44-1] entered on: 02/12/98. Fee not paid (govt.). (lkn) [Entry date 02/17/98] [Edit date 02/17/98] [1:97cv2393]

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA
(WASHINGTON)

CIVIL DOCKET #: 97-CV-2463

SNAKE RIVER POTATO GROWERS, INC.
MIKE CRANNEY, PLAINTIFFS

v.

ROBERT E. RUBIN, SECRETARY OF
THE TREASURY, DEFENDANT

DOCKET ENTRIES

1997

Oct. 21	(1)	COMPLAINT filed by plaintiff SNAKE RIVER POTATO, plaintiff MIKE CRANNEY (lkn) [Entry date 10/28/97] [1:97cv2463]
		* * * * *
Oct. 24	(3)	ORDER by Judge Thomas F. Hogan: directing that Civil Actions 97-2399 and 97-2463 are consolidated with Civil Action 97-2393, for all purposes, before Judge Thomas F. Hogan. (N) (gew) [Entry date 10/28/97] [1:97cv2463]
		* * * * *
Nov. 12	(13)	MOTION filed by federal defendant WILLIAM J. CLINTON in

1:97-cv-02393, federal defendant DONNA E. SHALALA in 1:97-cv-02393, federal defendant FRANKLIN D. RAINES in 1:97-cv-02393, federal defendant USA in 1:97-cv-02399, federal defendant WILLIAM J. CLINTON in 1:97-cv-02399, federal defendant FRANKLIN D. RAINES in 1:97-cv-02399, federal defendant ROBERT E. RUBIN in 1:97-cv-02463 to dismiss complaint [1-1] in 1:97-cv-02463; Declaration (1). (lkn) [Entry date 11/13/97] [1:97cv2393 1:97cv2399 1:97cv2463]

Nov. 26 (14) MOTION filed by plaintiff SNAKE RIVER POTATO in 1:97-cv-02463, plaintiff MIKE CRANNEY in 1:97-cv-02463 for summary judgment; Appendix. (lkn) [Entry date 11/28/97] [1:97cv2393 1:97cv2399 1:97cv2463]

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Dec. 18 (21) MOTION filed by federal defendant WILLIAM J. CLINTON in 1:97-cv-02393, federal defendant DONNA E. SHALALA in 1:97-cv-02393, federal defendant FRANKLIN D. RAINES in 1:97-cv-02393, federal defendant USA in 1:97-cv-02399, federal defendant WILLIAM J. CLINTON in 1:97-cv-02399, federal defendant FRANKLIN D. RAINES in

1:97-cv-02399, federal defendant ROBERT E. RUBIN in 1:97-cv-02463 for summary judgment (lkn) [Entry date 12/19/97] [1:97cv2393 1:97cv2399 1:97cv2463]

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Dec. 31 — JOINT MOTION by plaintiff in 1:97-cv-02399, federal defendant in 1:97-cv-02399, plaintiff in 1:97-cv-02399, federal defendant in 1:97-cv-02399 for order granting partial relief and otherwise dismissing action as moot (lkn) [Entry date 01/06/98] [1:97cv2399]

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1998

Jan. 14 — MOTION HEARING before Judge Thomas F. Hogan Reporter: Patricia J. Yerkes (gew) [Entry date 01/16/98] [1:97cv2463]

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Jan. 28 — TRANSCRIPT filed for date(s) of 01/14/98. Reporter: Patricia J. Yerkes (lkn) [Entry date 01/29/98] [1:97cv2393]

Feb. 12 (29) MEMORANDUM OPINION by Judge Thomas F. Hogan (N) (cjp) [1:97cv2393 1:97cv2463]

Feb. 12 (30) ORDER by Judge Thomas F. Hogan : directing that the Line Item Veto

Act, Pub. L. No. 104-130, 110 Stat. (1996), is adjudged and declared unconstitutional; denying motion to dismiss complaint [1-1] in 1:97-cv-02463 [13-1] by federal defendant in 1:97-cv-02393, 1:97-cv-02463, denying motion for summary judgment [32-1] by federal defendant in 1:97-cv-02393, 1:97-cv-02463, granting motion for summary judgment [17-1] by plaintiff in 1:97-cv-02393, granting motion for summary judgment [14-1] by MIKE CRANNEY, SNAKE RIVER POTATO in 1:97-cv-02393, 1:97-cv-02463 (N) (cjp) [1:97cv2393 1:97cv2463]

Feb. 13 (31) NOTICE OF APPEAL by federal defendant ROBERT E. RUBIN in 1:97-cv-02463 to the U.S. Supreme Court from order [30-1], entered on: 02/12/98. Fee not paid (govt.) (lkn) [Entry date 02/17/98] [Edit date 02/17/98] [1:97cv2463]

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

No. 1:97CV02463

SNAKE RIVER POTATO GROWERS, INC.
1010 WEST RIDGE STREET
P.O. BOX 949
BLACKFOOT, ID 83221

MIKE CRANNEY
ROUTE 1, BOX 40-D
OAKLEY, ID 83346,
PLAINTIFFS

v.

ROBERT E. RUBIN,
SECRETARY OF THE TREASURY
15TH STREET AND PENNSYLVANIA AVENUE
WASHINGTON, D.C. 20220,
DEFENDANT

[Filed: Oct. 21, 1997]

COMPLAINT FOR DECLARATORY RELIEF

Nature of This Action

1. On April 9, 1996, President Clinton signed into law the Line Item Veto Act, Pub. L. No. 104-130, 110 Stat. 120. That legislation, codified at 2 U.S.C. § § 691 *et seq.*, gives the President authority to "cancel in whole," at any time up to five days (excluding Sundays) after signing a bill, any limited tax benefit, dollar amount of appropriation, or item of new direct

spending contained in the bill. Canceling items in a bill renders them without legal force or effect. The Act provides that "any individual adversely affected by the [Act] may bring an action" in this Court to challenge the Act's constitutionality.

2. On August 5, 1997, then President signed into law the Taxpayer Relief Act of 1997, Pub. L. 105-34, 111 Stat. 788 ("TRA"). Section 968 of that Act amended the Internal Revenue Code to allow the owner of the stock of a qualified agricultural refiner or processor to defer recognition of gain on the sale of such stock to an eligible farmers' cooperative. On August 11, 1997, the President identified this provision as a "limited tax benefit" within the meaning of the Line Item Veto Act and canceled it in its entirety.

3. This cancellation has injured the plaintiffs, an eligible farmers' cooperative organized to purchase agricultural processing facilities, and an individual member of the cooperative. The cancellation makes it more difficult for plaintiffs to purchase qualified processors by eliminating the right of potential sellers to defer taxes on their gains, and plaintiffs have already lost one significant business opportunity as a result of the cancellation. Plaintiffs seek a declaration that the Line Item Veto Act violates Article I of the U.S. Constitution by giving the President an impermissible unilateral power to revise and repeal federal law, and that the purported cancellation of the cooperative taxation provision was without effect.

Jurisdiction and Venue

4. This Court has subject matter jurisdiction pursuant to 2 U.S.C. § 692(a)(1) and 28 U.S.C. § 1331.

5. This court may enter a declaratory judgment under 2 U.S.C. § 692(a)(1) and 28 U.S.C. § 2201.

6. Venue in this Court is proper pursuant to 2 U.S.C. § 692(a)(1).

Parties

7. Plaintiff Snake River Potato Growers, Inc. ("Snake River") is a cooperative association incorporated under Idaho law with its principal offices at 1010 West Bridge Street, Blackfoot, Idaho. Its membership consists of approximately 30 potato growers located throughout Idaho, who each own shares of the cooperative. Snake River is an "eligible farmers' cooperative" within the meaning of Section 968 of TRA. Snake River brings this action on behalf of itself and its member growers.

8. Plaintiff Mike Cranney is a potato grower with farms located in Cassia County, Idaho. He also grows sugar beets, grains, and other crops. He is a member, Director, and Vice Chairman of Snake River.

9. Defendant Robert E. Rubin is the Secretary of the Treasury and is sued in his official capacity. In his official capacity, defendant Rubin is responsible for executing the President's cancellations of "limited tax benefits" under the Act and for executing and enforcing the tax laws of the United States.

Facts

A. The Line Item Veto Act

10. The Line Item Veto Act provides that the President may, immediately or within five days (excluding Sundays) after signing a bill into law, "cancel" any "limited tax benefit" contained in that bill. 2 U.S.C. § 691(a). A "limited tax benefit" is defined, with some exceptions, as (1) a "revenue-losing [tax] provision which" benefits "100 or fewer beneficiaries in any fiscal year or (2) a "Federal tax provision

which provides temporary or permanent transition relief for 10 or fewer beneficiaires in any fiscal year." *Id.* § 691e(9)(A). The Act provides that the President's cancellation of a limited tax benefit prevents it "from having legal force or effect." *Id.* § 691e(4).

B. Section 968 of the Taxpayer Relief Act and Its Cancellation

11. Section 968 of the TRA (entitled "Nonrecognition of Gain on Sale of Stock to Certain Farm Cooperatives," and hereinafter referred to as "Section 968") amended the Internal Revenue Code to allow owners of agricultural refining or processing companies to defer paying taxes on their gains when they sell these companies to eligible farmers' cooperatives. The President signed Section 968 into law on August 5, 1997.

12. On August 11, 1997, exercising his purported authority under the Line Item Veto Act, the President "canceled" Section 968 "in its entirety." On that date, the President transmitted a special message containing Cancellation No. 97-2 to the President of the Senate and the Speaker of the House of Representatives. As provided by the Line Item Veto Act, Section 968 ceased "having legal force or effect" upon transmission and receipt of the special message.

C. Effect of the Cancellation on Plaintiffs

13. Snake River was formed in May 1997 to assist Idaho potato growers in marketing their crops and stabilizing prices, in part through a strategy of acquiring potato processing facilities. Such acquisitions allow individual growers to aggregate their crops and process and deliver them to market jointly. These acquisitions also enable the individual members of Snake River to retain revenues formerly paid out to third-party processors.

14. As an individual potato grower and member of Snake River, Cranney benefits from Snake River's acquisition of potato processing facilities by being able to combine his crops with those of other growers for more efficient processing and marketing, while retaining a share of the processing revenues. In addition to his participation in Snake River, Cranney can obtain similar benefits for his other crops by forming cooperatives with other growers to purchase the facilities of the processors and refiners whom they are currently supplying with crops.

15. Had it not been canceled, Section 968 would have made it significantly easier for Snake River to carry out its planned purchases of the facilities of the processors whom their members currently supply. Section 968 would have allowed a processor to sell its facilities to Snake River without having to pay tax currently on any gain, which would have allowed Snake River to offer and would have encouraged a processor to accept a lower price for those facilities. As a result of the cancellation of Section 968, however, Snake River must generally pay more for these purchases because the sellers will owe taxes currently on any gain on the sales. The business opportunity farmers' cooperatives have lost as a result of the cancellation of Section 968 is significant: in his cancellation message, the President estimated that sellers could have used Section 968 to defer paying $98 million in taxes over the next five years, and $155 million over the next ten.

16. The President's cancellation of Section 968 has concretely interfered with at least one transaction that Snake River had planned. Beginning in May

1997, when Congress was first considering the proposals in Section 968, Cranney and another officer of Snake River discussed with Howard Phillips, a principal owner of Idaho Potato Packers ("IPP"), the purchase by Snake River of the stock of a company owning an IPP potato processing facility in Blackfoot, Idaho. This company would have been a "qualified processor" under Section 968. Phillips was interested in pursuing the sale because he could defer taxes on his gain if Section 968 passed. Snake River anticipated that it would complete the purchase if Section 968 passed. The negotiations did not continue as a result of the President's cancellation of Section 968; Snake River would have to increase its purchase offer in order to compensate Phillips for the taxes he would owe currently on such a sale without Section 968. Snake River thus lost a significant business opportunity as a result of the President's cancellation of Section 968.

17. Cranney has similarly been harmed by the cancellation of Section 968. As a general matter, it is now harder both for Snake River to purchase processing facilities for his potato crops, and for him to do the same through other cooperatives with respect to his other crops. And because of the cancellation's interference with Snake River's purchase of the Idaho Potato Packers facility, Cranney has also lost his share of potential processing revenues as well as the efficiencies of being able to aggregate his potato crops with other growers' for processing.

Claim for Relief

18. The Line Item Veto Act grants the President the power to allow some parts of a bill that both Houses of Congress have passed and he has signed to become law, and to cancel other parts of the same bill and return them to Congress. Whether this power is viewed as a unilateral power of line-item revision of bills that have been presented for his signature, or as granting him a unilateral power to repeal portions of duly enacted laws, the Act grants powers to the President that contravene the constitutional process for making federal law.

19. Article I of the Constitution provides a "single, finely wrought and exhaustively considered procedure" for making or changing federal law. *Immigration and Naturalization Service* v. *Chadha*, 462 U.S. 919, 951 (1983). It vests all federal legislative powers in Congress made up of two Houses. It requires that each bill pass by majority vote in both houses before it may become law. The Presentment Clause of Article I (Art. I, sec. 7, cl. 2) then requires that the bill be presented to the President, and it gives him only three choices: to "approve" the whole bill as it stands and sign it; to "return" (*i.e.* veto) the whole bill; or to allow the whole bill to become law without his signature. The requirement of bicameral passage and presentment to the President applies to the repeal of provisions of law, as well as their enactment or amendment.

20. The Line Item Veto Act violates Article I. The Act unconstitutionally expands the President's power with respect to certain bills presented to him: under the Act, he may "approve" these bills and sign them into law and, at the same instant or up to five days later, may disapprove and "return" parts of these bills, so that the disapproved parts of the bills do not have the force and effect of law. The Act also violates the requirement of bicameral passage and presentment by granting to the President unilateral author-

ity to "cancel" and thus repeal provisions of federal law.

Prayer for Relief

Wherefore Plaintiffs pray

(1) For a declaratory judgment that the Line Item Veto Act is unconstitutional, that the President's purported cancellation of Section 968 of the Taxpayer Relief Act of 1997 is invalid, and that Section 968 remains valid law.

(2) For reimbursement of their costs in this action and for such other relief as the Court may deem appropriate.

Respectfully submitted,

/s/ WILLIAM H. ORTON
DONALD B. HOLBROOK
RANDON W. WILSON
WILLIAM H. ORTON
(D.C. Bar No. 413745)
ANDREW H. STONE
JONES, WALDO, HOLBROOK
& McDONOUGH
1500 First Interstate Plaza
170 South Main Street
Salt Lake City, UT 84101
(801) 328-0537

/s/ illegible
LLOYD N. CUTLER
(D.C. Bar No. 082321)
LOUIS R. COHEN
(D.C. Bar No. 098079)
LAWRENCE A. KASTEN
(D.C. Bar. No. 443307)
JONATHAN J. FRANKEL
(D.C. Bar No. 450109)
WILMER, CUTLER & PICKERING
2445 M Street, N.W.
Washington, DC 20037-1420

DATE: October 21, 1997

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

No. 1:97CV02393

THE CITY OF NEW YORK
CITY HALL
NEW YORK, NY 10007

NEW YORK CITY HEALTH AND HOSPITALS
CORPORATION
125 WORTH STREET
NEW YORK, NY 10013

GREATER NEW YORK HOSPITAL ASSOCIATION
555 WEST 57TH STREET
NEW YORK, NY 10019

JAMAICA HOSPITAL MEDICAL CENTER
89TH AVENUE AND VAN WYEK EXPRESSWAY
JAMAICA, NY 11435

DISTRICT COUNCIL 37, AMERICAN FEDERATION
OF STATE, COUNTY AND MUNICIPAL EMPLOYEES
125 BARCLAY STREET
NEW YORK, NY 10007

LOCAL 1199, NATIONAL HEALTH AND HUMAN
SERVICE EMPLOYEES UNION
310 WEST 43RD STREET
NEW YORK, NY 10036, PLAINTIFFS

v.

WILLIAM J. CLINTON
PRESIDENT OF THE UNITED STATES OF AMERICA
THE WHITE HOUSE
WASHINGTON, DC 20500

DONNA E. SHALALA
SECRETARY OF HEALTH AND HUMAN SERVICES
200 INDEPENDENCE AVENUE S.W.
WASHINGTON, DC 20201

FRANKLIN D. RAINES
DIRECTOR OF THE OFFICE OF MANAGEMENT
AND BUDGET
ROOM 252
OLD EXECUTIVE OFFICE BUILDING
WASHINGTON, DC 20503, DEFENDANTS

[Filed: Oct. 20, 1997]

COMPLAINT FOR DECLARATORY RELIEF

Preliminary Statement

1. On April 9, 1996, President William J. Clinton signed into law the Line Item Veto Act, Pub. L. No. 104-130, 110 Stat. 1200 ("Line Item Veto Act"), codified at 2 U.S.C. § 691. The Line Item Veto Act gives the President authority to "cancel," within five days after signing a bill into law, "any dollar amount of discretionary budget authority; . . . any item of new direct spending; or . . . any limited tax benefit" contained in the law.

2. On August 11, 1997, President Clinton for the first time exercised his authority under the Line Item Veto Act. After signing into law the Balanced Budget Act of 1997, Pub. L. 105-33 ("Budget Act"), the President cancelled a provision, Section 4722(c), which had established that certain New York State expenditures derived from certain health care provider taxes qualified for federal financial participation under the Medicaid program. Cancellation of Section

4722(c) results in exposure to additional liabilities of millions of dollars, primarily imposed upon facilities which provide care to needy and uninsured individuals. It will also have a substantial adverse economic impact on the employees of such institutions, the populations they serve, and the health and well-being of residents of the City of New York.

3. Plaintiffs seek a declaration that the Line Item Veto Act, and the President's purported exercise of his authority thereunder, violates Article I of the Constitution of the United States, both by impermissibly expanding the power of the President and by infringing the requirements of bicameral passage and presentment insofar as it permits the President, without legislative action, to repeal duly enacted federal law.

Jurisdiction and Venue

4. The Court has subject matter jurisdiction pursuant to 2 U.S.C. § 692(a)(1) and 28 U.S.C. § 1331.

5. This Court may enter a declaratory judgment pursuant to 2 U.S.C. § 692(a)(1) and 28 U.S.C. § 2201.

6. Venue in this Court is proper pursuant to 2 U.S.C. § 692(a)(1).

Parties

7. Plaintiff the City of New York ("City") is a municipal corporation organized and existing under the laws of the State of New York.

8. Plaintiff New York City Health and Hospitals Corporation ("NYCHHC"), a public benefit corporation organized and existing under the laws of the State of New York, with its principal place of business at 125 Worth Street, New York, New York 10013, is responsible for the operation of public health care

facilities throughout the City of New York, and is a member of plaintiff GNYHA. NYCHHC serves a significant number of Medicaid-eligible individuals and depends on the Medicaid program for a substantial amount of its revenue.

9. Plaintiff Greater New York Hospital Association ("GNYHA") is a New York State not-for-profit association, with its principal place of business at 555 West 57th Street, New York, New York 10019. Its membership consists of over 100 non-profit voluntary and public hospitals and 75 continuing care facilities in New York City and surrounding communities. GNYHA provides technical, administrative, legal and other services to its individual members, and acts on behalf of all its members as a group by promoting or opposing legislation affecting its members, by litigating issues of common concern, by conducting research and gathering and analyzing information about the health care industry in New York State and nationally, and generally by acting to further the goals and interests of its members. GNYHA brings this action on behalf of its member facilities who are and will be adversely affected by the cancellation of Section 4722(c).

10. Plaintiff Jamaica Hospital Medical Center ("Jamaica Hospital"), located in Jamaica, New York, is a 365-bed teaching hospital serving the boroughs of Queens and Brooklyn in the City of New York and is a member of plaintiff GNYHA. It serves a significant number of Medicaid-eligible individuals, and depends on the Medicaid program for a substantial amount of its revenue.

11. Plaintiffs District Council 37, American Federation of State, County and Municipal Employees, and Local 1199, National Health and Human Service

Employees Union, are labor organizations among each of whose members are many employed in health care and related fields in the City of New York.

12. Defendant William J. Clinton is President of the United States of America, with powers set forth in the Constitution of the United States of America, and is sued in his official capacity.

13. Defendant Donna E. Shalala is Secretary of Health and Human Services and is sued in her official capacity. In that capacity, defendant Shalala is responsible for supervising administration of the Health Care Financing Administration ("HCFA") and federal payments under the Medicaid program.

14. Defendant Franklin D. Raines is the Director of the Office of Management and Budget and is sued in his official capacity. In that capacity, defendant Raines is responsible for executing the President's cancellations of budgetary and spending authority under the Line Item Veto Act.

Constitutional and Statutory Framework

15. Article I of the Constitution of the United States, provides, in Section 7, that a bill becomes a law only upon completion of a two-stage process. *First*, the bill must pass both the House of Representatives and the Senate and be presented to the President. *Second*, it must: (a) be signed by the President; or (b) be returned by the President with objection (*i.e.*, vetoed) and then approved by two-thirds of each house of Congress; or (c) remain, neither signed nor returned, with the President for ten days after presentment, provided that Congress has not adjourned during the interval.

16. The Line Item Veto Act provides that the President may, within five days after signing a bill

into law pursuant to the Presentment Clause, "cancel" any dollar amount of "discretionary budget authority" (*i.e.*, appropriations), any item of "new direct spending," or any "limited tax benefit" contained in that law. The act defines "cancel" to mean "rescind" in the case of an appropriation, and "prevent . . . from having legal force or effect" in all other cases. To exercise his authority, the President is required to determine only that the cancellation will reduce the federal budget deficit, not impair essential government functions, and not harm the national interest. 2 U.S.C. § 691.

17. The Balanced Budget Act of 1997 was passed by the House of Representatives on July 30, 1997, was passed by the Senate on July 31, and was sent to President Clinton for his signature on August 1. He signed it into law on August 5. As more fully explained below, Section 4722(c) of the Budget Act provides, in pertinent part, that certain assessments that were collected from New York State health care providers "are deemed to be permissible health care related taxes" rendering them eligible for matching federal health care funds. The President then cancelled Section 4722(c), on August 11.

Facts

18. The federal Medicaid program provides for federal financial participation ("FFP") to match certain State Medicaid expenditures, including those derived from health care provider taxes that meet specified statutory criteria, in particular expenditures derived from taxes that are "broad-based" (*i.e.*, applied to all health care providers within the same class) and "uniform" (*i.e.*, applied equally to all taxed providers). HCFA has challenged the payments of

FFP to New York State in connection with certain revenues collected by the State through taxes or other charges levied on health care providers (including plaintiffs NYCHHC and Jamaica Hospital and other members of plaintiff GNYHA) after October 1, 1992, the effective date (for New York State) of the Medicaid Voluntary Contribution and Provider Specific Tax Amendments of 1991, P.L. 102-234 ("1991 Amendments"), codified at 42 U.S.C. § 1396b(w), and the pertinent regulations thereunder, 42 C.F.R. § 433.50-74.

19. Under the 1991 Amendments, a finding by HCFA that a State's taxes were impermissible effects a disallowance of the State's Medicaid expenditures based on such taxes for a period of time during which the impermissible taxes were in effect, and, consequently, entails disallowance and recoupment of FFP that was already paid and that was associated with such expenditures.

20. On December 19, 1994 HCFA notified New York State that 19 identified tax programs did not meet the requirements of, *inter alia*, the 1991 Amendments and that, in accordance with the Amendments, the State should explain how each tax or other revenue source met those requirements, why the requirements were not applicable, or request waiver of the requirements for the particular tax or revenue source at issue.

21. At that time HCFA estimated the amount of FFP for New York State potentially subject to recoupment at $955 million. Since December 19, 1994 New York State has submitted over 60 waiver applications, which to date have not been approved, with respect to the taxes at issue or continuations of the same or related tax programs. Although HCFA has

not provided an updated estimate, the amount of FFP for New York State potentially subject to recoupment has increased substantially since December 19, 1994 and is now estimated to be $2.6 billion.

22. That potential recoupment stems, in part, from HCFA's determination that certain taxes that have been imposed on hospitals and nursing homes, including plaintiffs NYCHHC and Jamaica Hospital and members of plaintiff GNYHA, as well as other health care providers, do not meet the 1991 Amendments' "uniform" criterion. The potential recoupment also stems, in part, from HCFA's determination that certain taxes that have been imposed on hospitals and nursing homes but from which Jamaica Hospital and certain other members of plaintiff GNYHA, as well as certain other health care providers, are exempt do not meet the 1991 Amendments' "broad-based" criterion. Wavier applications were submitted to HCFA to explain how those tax programs further the purposes of the Medicaid program and the 1991 Amendments despite their exclusion of certain provider revenues and types of providers.

23. On October 9, 1997 HCFA announced the correction of an error in its regulations. That correction could reduce somewhat the potential FFP recoupment liability at issue in some of New York State's pending waiver applications. At the same time, HCFA indicated that the majority of taxes at issue would continue to be disapproved absent new federal legislation or a curative and retroactive change in New York State's tax provisions.

24. The New York State Public Health Law provides that, in the event HCFA finds that New York's taxes on hospitals and nursing homes are impermissible, the taxes are modified retroactive to their effec-

tive dates and will be imposed upon previously excluded sources of revenue and classes of providers, as required by HCFA, and that the State Commissioner of Health shall collect those amounts due with interest and penalties if payment is not made within 90 days of notification of liability. Provisions specifying how HCFA's disallowances are to be collected from individual health care providers are set forth in detail in, *e.g.*, N.Y. Pub. Health Law §§ 2807-c(18)(b), 18(d), 18(e); 2807-d(1)(b), (3), (12); 2807-j(3), 2807-j(11); 2807-j(12); 28-7-k(15); 2807-l(3); 2807-s(3), 2807-s(8); 2807-s(9).

25. Plaintiffs NYCHHC and Jamaica Hospital, and other members of plaintiff GNYHA, will suffer harm from the automatic imposition of these increased assessments and liabilities that result from a finding that the State's taxes are impermissible. For example, NYCHHC and other GNYHA member hospitals receive distributions, from, *inter alia*, a bad debt and charity care regional pool (section 2807-c(16)), and NYCHCC and several GNYHA member hospitals have benefited from, *inter alia*, the State's supplementary low income patient adjustment (section 2807-c(14-d)), sources which, under State law (section 2807-c(18)(d)), have been treated as excluded from NYCHHC's and other GNYHA member hospitals' gross revenue tax liability. However, upon a finding by HCFA that such exclusions are impermissible, the exclusions will immediately become null and void and NYCHHC and other GNYHA member hospitals will thereafter be subject to outstanding gross revenue tax liabilities on the previously excluded revenue. Section 2807-C(18)(e). The resulting increase in these plaintiffs' tax liability will be millions of dollars and, in the case of NYCHHC alone, will be more than

$4 million for each year at issue. Plaintiff Jamaica Hospital, by virtue of its designation under New York State law as a financially distressed hospital (section 2807-c(19)(c)), has benefitted, for example, from being exempted from paying the gross revenue and bad debt and charity care and capital statewide pool taxes on any of its revenues. Section 2807-c(18)(b), 2807-d(l)(b). Upon a finding by HCFA that the exclusion of financially distressed hospitals from taxation is impermissible, the exclusions will immediately become null and void and Jamaica Hospital will be subject to the gross revenue and statewide bad debt and charity care pool taxes retroactive to 1992, section 2807-c(18)(e), 2807-d(12), resulting in a tax liability to it of millions of dollars.

26. Section 4722(c) of the Budget Act (i) resolved the controversy arising out of HCFA's 1994 announcement that it deemed impermissible the subject tax programs and HCFA's subsequent failure to approve the waiver applications submitted as a consequence of its announcement, and (ii) relieved the hospital plaintiffs of the costs following from a disallowance by HCFA of the disputed expenditures.

27. The effect of the cancellation of Section 4722(c) on plaintiffs NYCHHC and Jamaica Hospital, and on other members of plaintiff GNYHA, is to reinstate their exposure to the increased assessments and liabilities described above and, as a consequence thereof, to burden such facilities' present abilities to engage in meaningful financial planning and borrowing of funds for operating and other projects.

28. The adverse impact of the cancellation of Section 4722(c) on plaintiffs NYCHHC and Jamaica Hospital, and on other members of plaintiff GNYHA, will result in diminished employment benefits and oppor-

tunities for their employees, including members of plaintiffs District Council 37 and Local 1199. The adverse impact on plaintiffs NYCHHC and Jamaica Hospital, and other members of plaintiff GNYHA located within the City of New York, will result in a diminution of the health and well-being of the City's residents and diversion of City resources to compensate for recouped funds.

Claim for Relief

29. Whether the Line Item Veto Act is viewed as granting the President a unilateral power of line-item revision of bills that have been presented for his signature, or as granting him a unilateral power to repeal portions of duly enacted laws, the Act grants powers to the President that contravene the constitutional process for making federal law.

30. Article I of the Constitution provides a single procedure for making or changing federal law. It vests all federal legislative powers in a Congress comprised of two Houses. It requires that any bill must pass by majority vote in both the House and the Senate before it may become a law. The Presentment Clause then requires that a bill, before it becomes a law, shall be presented to the President, and it gives the President only three choices with respect to a bill presented to him: to "approve" the whole bill and sign it; to "return" (*i.e.*, veto) the whole bill; or to allow the whole bill to become law without his signature. The requirement of bicameral passage and presentment to the President applies to the repeal, as well as enactment or amendment of provisions of law.

31. The Line Item Veto Act violates Article I of the United States Constitution both by impermissibly expanding the powers of the President and by

infringing the requirements of bicameral passage and presentment.

32. The effect of the President's exercise of his purported authority under the Line Item Veto Act to cancel Section 4722(c) of the Budget Act is to cause plaintiffs serious concrete fiscal injury by exposing them to the consequences of HCFA recoupment of contested FFP.

Prayer for Relief

Wherefore, plaintiffs pray:

1. For a declaratory judgment that the Act is unconstitutional, that Cancellation No. 97-3 is invalid, and Section 4722(c) is valid and subsisting law.

2. For reimbursement of their costs in this action, and for such other relief as the Court may deem appropriate.

Respectfully submitted.

By: /s/ M. SEAN LAANE
M. SEAN LAANE
(D.C. Bar No. 422267)
ARNOLD & PORTER
555 12th Street, N.W.
Washington, DC 20004
(202) 942-5000
Counsel for Plaintiffs the
City of New York,
New York City Health and
Hospitals Corporation,
District Council 37,
American Federation of
State, County and Municipal
Employees, and Local 1199,
National Health and Human
Service Employees Union

By: /s/ CHARLES J. COOPER/by ws
CHARLES J. COOPER
(D.C. Bar No. 248070)
COOPER & CARVIN, PLLC
2000 K Street, N.W.
Washington, DC 20006
(202) 822-8950
Counsel for Plaintiffs
Greater New York
Hospital Association and
Jamaica Hospital
Medical Center

Of Counsel:

Paul A. Crotty
Corporation Counsel of the City of New York
Lorna B. Goodman
David B. Goldin
Paul E. Kazanoff
Assistant Corporation Counsels
Counsel for Plaintiffs City of New York
and New York City
Health and Hospitals Corporation
100 Church Street, Room 3-164
New York, New York 10007
(212) 788-0999

Peter F. Nadel
Rosenman & Colin LLP
Counsel for Plaintiffs Greater New York
Hospital Association and
Jamaica Hospital Medical Center
575 Madison Avenue
New York, New York 10022
(212) 940-7010

Richard Ferreri
General Counsel
District 37, American Federal of State, County
and Municipal Employees
125 Barclay Street
New York, New York 10007
(212) 815-1450

Basil Patterson
Meyer Suozzi English & Klein PC
Counsel for Plaintiff Local 1199,
National Health and Human
Service Employees Union
1505 Kellum Place
Mineola, New York 11501
(516) 741-6565

Dated: Washington, D.C.
October 16, 1997

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civ. No. 97-2393 (TFH)

THE CITY OF NEW YORK, ET AL.
PLAINTIFFS

v.

WILLIAM J. CLINTON, ET AL.,
DEFENDANTS

Civ. No. 97-2399 (TFH)

NATIONAL TREASURY EMPLOYEES
UNION ET AL., PLAINTIFFS

v.

UNITED STATES OF AMERICA,
DEFENDANT

Civ. No. 97-2463 (TFH)

SNAKE RIVER POTATO GROWERS,
INC., ET AL., PLAINTIFFS

v.

ROBERT E. RUBIN,
DEFENDANT

DECLARATION OF CHARLENE BROWN

I, CHARLENE BROWN, hereby declare under penalty of perjury, pursuant to 28 U.S.C. § 1746, as follows:

1. I am the Director of the Policy Coordination and Planning Group of the Center for Medicaid and State Operations in the Health Care Financing Administration ("HCFA") of the Department of Health and Human Services ("HHS"). I have been the Director of the Policy Coordination and Planning Group since July 7, 1997. The statements made herein are based on my personal knowledge and on information obtained in my capacity as Director of the Policy Coordination and Planning Group. This declaration is submitted in support of Defendants' Motion to Dismiss.

2. HCFA is the agency within HHS that is responsible for the administration of the Medicare and Medicaid programs. Prior to the establishment of the HCFA in 1977, the programs were administered by the Bureau of Health Insurance.

3. The Medicaid program is a joint federal-state program, jointly financed by the federal and state governments and administered by the states, which allows participating states to assist individuals who cannot afford necessary medical care. 42 C.F.R. § 430.0. The federal government provides its contribution by paying each state matching funds, known as federal financial participation ("FFP"), which are based on the state's medical assistance expenditures as calculated under a prescribed formula. Social Security Act, § 1905(b), 42 U.S.C. § 1396d(b). Generally, 50 percent of all state expenditures necessary "for the proper and efficient administration of the state plan" for medical assistance are reimbursed by HHS, 42 U.S.C. § 1396b(a)(7), although the rate of FFP may

vary for particular costs. *See, e.g., id.* § 1396b(a)(3). Payments for health care services are made directly by the state to the individuals or entities that furnish the services. 42 C.F.R. § 430.0. No FFP or other federal funds are paid directly to local government entities or health care providers under the Medicaid program.

4. Under the Medicaid Voluntary Contribution and Provider Specific Tax Amendments of 1991, Pub. L. 102-234, 105 Stat. 1793, and the regulations promulgated thereunder, 42 C.F.R. Part 433, Subpart B, a state's medical assistance expenditures, used to calculate its FFP, will be reduced by the revenues the state receives from health care related taxes unless the taxes meet certain statutory and regulatory criteria. *See* 42 U.S.C. § 1396b(w); 42 C.F.R. § 433.57. In order for a health care related tax to be permissible—i.e., one which will not result in reduction of the state's medical assistance expenditures—it must (1) be assessed on a permissible class of items or services, as defined by statute and/or regulation; (2) be broad-based, in that it applies to all providers within a permissible class of items or services; (3) be uniform, in that the same rate applies to all providers within a permissible class of items or services; and (4) not contain a hold harmless provision which provides for repayment of part or all of the tax to the taxed providers. 42 C.F.R. § 433.68. If a health care related tax does not meet the broad-based and uniform criteria, a state may submit a waiver application to the Secretary requesting that the tax be treated as a permissible health care related tax, if the tax is, *inter alia*, generally redistributive. 42 U.S.C. § 1396b(w)(3)(E). The requirement that the tax be assessed on a permissible class of items or services cannot be

waived; however, a state may request that additional classes of items or services be added to those provided by statute and regulation. *See* 58 Fed. Reg. 43155, 43169 (Aug. 13, 1993).

5. On December 19, 1994, HCFA sent out two notices to states regarding the states' health care related taxes. The first notice informed the states that certain of their health care related taxes required a waiver of the broad-based and uniform criteria, and invited the states to submit requests for waivers. The second notice informed the states that certain of their health care related taxes appeared to be impermissible because they did not satisfy the criteria requiring that taxes be assessed on a permissible class of items or services, or that the taxes not contain hold harmless provisions. Neither notice served as a final agency decision that any health care related tax required a reduction in a state's medical assistance expenditures, and therefore its amount of FFP, under 42 U.S.C. § 1396b(w). The State of New York received both notices.

6. In order to obtain a waiver of the broad-based and/or uniform requirements, a state must submit a waiver request to HCFA. 42 C.F.R. §§ 433.68, 433.72. After receiving a waiver request, HCFA reviews the waiver request to determine whether a waiver of the broad-based and/or uniform requirements should be granted. Neither the statute nor the regulations require that HCFA make a determination within a definite time period. As of the present date, HCFA has granted waivers of the broad-based and uniform requirements to some states, and has yet to deny any request for a waiver of the broad-based and/or uniform requirements for the State of New York. If HCFA eventually denies a waiver request, future quarterly

medical expenditure reports would be reduced by the total amount of the impermissible tax revenue collected by the state. The state would have the opportunity to appeal the decision to HHS' Departmental Appeals Board. *See* 42 C.F.R. § 430.42.

7. The State of New York has submitted requests for waiver of the broad-based and/or uniform requirements for several health care related taxes imposed by the State. HCFA has made no formal decision regarding New York's requests for waivers. Pending determination of New York's requests for waivers, its medical assistance expenditures calculations have not been affected in any way by the health care related taxes for which waiver requests have been submitted and its FFP has not been reduced.

8. The State of New York also has petitioned for the inclusion of certain additional classes of items or services beyond those currently permitted by statute and regulation as eligible subjects for permissible health care related taxes. As noted in paragraph 4 above, the preamble to the implementing regulation identified the criteria a State's tax program must meet in order for the Secretary to consider adding permissible classes of health care items or services. *See* 58 Fed. Reg. 43155, 43169 (Aug. 13, 1993). However, even if the classes of items or services at issue in New York's petition were added to the permissible list of classes of items or services, in some cases the taxes in question still would not satisfy the broad-based and uniform criteria. Thus, the State also submitted requests for waiver of the broad-based and uniform requirements as to those taxes.

9. Section 4722(c) of the Balanced Budget Act of 1997, provided that all health care related taxes for which the State of New York had applied for a waiver,

were deemed permissible health care related taxes and in compliance with the broad-based and uniform requirements.

10. On August 11, 1997, the President exercised his authority under the Line Item Veto Act to cancel section 4722(c). The cancellation of section 4722(c) has not resulted in a reduction of the payment of FFP to the State of New York with respect to the health care related taxes for which the State has submitted waiver requests. In other words, as of the present date, the State of New York has received exactly the same amount of FFP it would have received if section 4722(c) had not been canceled and were currently in effect. The cancellation of section 4722(c) has not affected the State of New York's requests for waivers of the broad-based and uniform criteria with respect to the taxes at issue; those requests are still pending before HCFA.

Executed on November 12, 1997

/s/ CHARLENE BROWN
CHARLENE BROWN

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civ. No. 97-2393 (TFH)

THE CITY OF NEW YORK, ET AL.
PLAINTIFFS

v.

WILLIAM J. CLINTON, ET AL.,
DEFENDANTS

Civ. No. 97-2339 (TFH)

NATIONAL TREASURY EMPLOYEES
UNION ET AL., PLAINTIFFS

v.

UNITED STATES OF AMERICA,
DEFENDANT

Civ. No. 97-2463 (TFH)

SNAKE RIVER POTATO GROWERS,
INC., ET AL., PLAINTIFFS

v.

ROBERT E. RUBIN,
DEFENDANT

I, Patricia J. Wang, hereby declare as follows:

1. I am the Senior Vice President of Health Finance and Managed Care for Plaintiff Greater New York Hospital Association (GNYHA), a membership organization consisting of approximately 175 public and voluntary, not-for-profit hospitals and long term care facilities in the greater New York metropolitan area. GNYHA performs policy and quantitative analyses and engages in advocacy on behalf of its membership at the local, State and Federal levels, particularly in the areas of Medicaid and Medicare payment policy. With respect to Defendants' challenged cancellation of section 4722(c) of the Balanced Budget Act of 1997 ("BBA"), Pub. L. No. 105-33, 111 Stat. 251, GNYHA has been working with State and Federal Congressional staff to analyze and try to help ameliorate the harm to Plaintiffs and the State of New York imposed by the cancellation, including joint strategy planning, participation at the State's request in briefings of the New York Congressional delegation and others, review of the specifics of the State and Federal governments' positions, and assessment of alternatives. This Declaration is made in support of Plaintiffs' Opposition to Defendants' Motion to Dismiss.

2. Plaintiff New York City Health and Hospitals Corporation ("NYCHHC"), which operates the municipal hospital system of the City of New York, is a member of GNYHA. Each year, its 11 acute care hospitals provide about 1.5 million days of inpatient care and 5 million outpatient and emergency room visits to primarily low income and Medicaid patients. In 1995, about 60% of its inpatient days were provided to Medicaid patients. NYCHHC serves as the principal provider of essential health care services to low income patients in New York City.

3. Plaintiff Jamaica Hospital Center ("Jamaica") is also a member of GNYHA. It is a voluntary, not-for-profit, 365-bed hospital located in Jamaica, Queens. It provides about 120,000 inpatient days and more than 240,000 outpatient and emergency room visits per year to a predominantly low-income patient population in Queens and Brooklyn; thus, in 1995, over 40% of inpatient days and 52% of discharges were supplied to Medicaid patients. From the mid-1980's through the end of 1996, when authorizing legislation expired, Jamaica was designated as a "financially distressed hospital" pursuant to the New York State Public Health Law. This designation means that State Commissioner of Health found that (1) there was a demonstrated public need for Jamaica's services at its current site and (2) the hospital was experiencing severe financial distress as a direct result of losses incurred from the provision of uncompensated and charity care. *See* N.Y.C.R.R. section 86-1.36; New York Public Health Law section 2807-c(19)(c). As a financially distressed hospital, Jamaica is a crucial part of the voluntary, not-for-profit hospital network for low income and Medicaid patients.

4. New York State ("New York" or the "State") imposes a number of taxes on hospitals and other providers such as nursing homes, health maintenance organizations, and health clinics. The taxes on hospitals date from the early 1980's, and taxes on other types of health care providers have been implemented over time. Revenue from these taxes has supported an array of comprehensive and innovative State health care programs for the poor. These include a program that provides health insurance for uninsured

children; partial compensation to hospitals that provide high volumes of free care to the uninsured; support for primary care physician and other health practioner training; and funding for a comprehensive AIDS Drug Assistance Program that subsidizes or pays for AIDS drugs for those without insurance. It has been imperative for the State to sponsor these local initiatives, particularly in the absence of a national approach assuring health insurance, to meet the needs of its uninsured residents.

5. The Medicaid Voluntary Contribution and Provider Specific Tax Amendments of 1991 ("Provider Tax Amendments"), Pub. L. No. 102-234, 105 Stat. 1793, 42 U.S.C. 1396b(w), require that a state's taxes be broad based, uniform, applied to permissible classes of health care providers, and lacking in hold harmless provisions. A state is permitted to submit requests to waive certain provisions of the Amendments if its taxes do not meet these statutory criteria. Whether such waivers are granted is governed by the regulations implementing the Provider Tax Amendments at 42 C.F.R. Part 433.50 et seq.

6. By two letters dated December 19, 1994 (Exhibit A hereto), the Health Care Financing Administration ("HCFA"), the Federal agency that oversees the Medicaid program, notified New York that 19 enumerated provider taxes either were not imposed upon permissible classes of providers or did not meet the broad based and uniformity requirements of the statute. The letters asked New York to supply further information as well as waiver requests for the tax programs. HCFA estimated at that time that about $1 billion of Federal Financial Participation ("FFP"), or the Federal share of New York's Medicaid expenditures, was subject to recoupment.

7. Upon information and belief, since January 1995, New York has submitted over 1200 pages of waiver requests representing more than 60 separate submissions for over 20 different provider tax programs. According to paragraph 7 of the Declaration of Charlene Brown submitted in support of Defendants' Motion to Dismiss, HCFA has not made any formal determinations with respect to these applications. Upon information and belief, New York State estimates that the amount of FFP subject to recoupment grew from HCFA's 1994 estimate of $1 billion to about $2.6 billion for the period of time October 1, 1992 through March 31, 1997.

8. New York State law imposes automatic tax liabilities upon hospitals and nursing homes upon a finding that New York's provider taxes are not permissible. *See, e.g.*, New York Public Health Law sections 2807-c(18)(b), (18)(d), (18)(e); 2807-d(1)(b), (3), (12); 2807-j(3), 2807-j(11), 2807-j(12); 2807-k(15); 2807-1(3); 2807-s(3), 2807s(8), 2807-s(9). GNYHA estimates that Plaintiff Jamaica's liability associated with two tax programs alone for which waivers have been filed[1] is about $10 million for the period 1993 through 1996. And, NYCHHC estimates that its retroactive tax liability would be $4 million for each year at issue. Complaint at paragraph 25.

9. Section 4722(c) of the BBA was enacted into law on August 5, 1997, and canceled by President Clinton on August 11, 1997. Section 4722(c) deemed that taxes collected by New York health care providers prior to June 1, 1997, for which a waiver had been applied or would be required, and as to which there had been no

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[1] These are a 1% inpatient revenue tax and a 0.7% gross receipts assessment.

action by defendant Secretary of Health and Human Services ("HHS") as of July 23, 1997, were permissible taxes under the Provider Tax Amendments.

10. Notwithstanding the absence of a formal HCFA ruling on New York's waiver applications, the Congressional Budget Office ("CBO"), which identifies the budgetary impact of Federal legislative proposal, determined that section 4722(c) would cost the Federal government $200 million in Federal Fiscal Year 1998. I am unaware of the particulars of CBO's calculation and why the $200 million figure is less than the $2.6 billion estimate, but I understand that given the uncertainties surrounding estimation of the total liability, CBO adopted a conservative interpretation of the amounts by which Federal outlays would be increased by virtue of the enactment of section 4722(c).

11. President Clinton's message accompanying his cancellation of section 4722(c) (Exhibit B hereto) identified $200 million as the amount by which Federal outlays would be decreased in Federal Fiscal Year 1998 as a result of his action. His message described that section 4722(c) would have given preferential treatment to New York by allowing it "to continue relying upon impermissible provider taxes to finance its Medicaid program," an approach that "would have increased Medicaid costs" and "established a costly precedent for other states to request comparable treatment."

12. At a White House press briefing on August 11, 1997, discussing the President's use of the line item veto (Exhibit C hereto), defendant Franklin Raines announced that HHS would work out an administrative solution with respect to one of New York's waiver requests, but went on to describe section

4722(c) as "a provision that provided special relief to the state of New York for provider taxes that *had been determined by HHS to be illegal* under a 1991 statute." (emphasis added). *Id.* at page 2. He further stated that, as a result of the cancellation, "New York will not be able" to obtain FFP on these taxes. *Ibid.* A clarifying regulation was published on October 15, 1997, 62 Fed. Reg. No. 199, page 53571 (Oct. 15, 1997), which, upon information and belief, makes it possible for one of New York's waivers to be approved, which might reduce the State's $2.6 billion FFP liability by about $700 million.

13. This regulatory change and unrelated policy clarifications were announced in a letter dated October 9, 1997, from Sally Richardson, Director of HCFA's Center for Medicaid and State Operations to all states, including New York (Exhibit D hereto). Otherwise, the letter states that HHS will work with states in trying to obtain *new* Federal legislation that grants HHS greater authority to resolve their outstanding tax issues. Ms. Richardson warned that if such legislation were not obtained by August 1998, the Secretary would "apply with full force the current law." Exhibit D at page 3.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on November 25, 1997

/s/ PATRICIA J. WANG
PATRICIA J. WANG

[seal omitted]

DEPARTMENT OF HEALTH & HUMAN SERVICES

Refer to

Region II
Federal Building
26 Federal Plaza
New York, NY 10278

December 19, 1994

Mr. Michael J. Dowling
Commissioner
New York State Department of Social Services
Ten Eyck Office Building
40 North Pearl Street
Albany, New York 12243-0001

Dear Mr. Dowling:

On August 13, 1993, HCFA published in the *Federal Register* a final rule implementing Public Law 102-234, "The Medicaid Voluntary Contribution and Provider Specific Tax Amendments of 1991".

This law amended provisions of Title XIX of the Social Security Act and established new limitations on Federal financial participation (FFP) when States receive funds donated by providers and revenues generated by certain health care related taxes.

The law also established a definition of the types of health care related tax revenues States are permitted

to receive, without a reduction in FFP. Such taxes are broad based taxes which apply to all health care providers in a given class in a uniform manner and which do not hold taxpayers harmless for their tax costs. Consequently, to the extent a State adopts a health care related tax program that otherwise meets the statutory provisions, the States will have acted within the limits of the law.

HCFA is aware that the State of New York imposed the following health care-related tax programs:

1. Effective January 1, 1991, a .6 percent gross receipts tax on personal care services, mental retardation day treatment services and mental retardation specialty hospital services;

2. Effective April 1, 1992, a 2.4 percent gross receipts tax on mental retardation day treatment services and mental retardation specialty hospital services;

3. Effective April 1, 1994, a gross receipts tax on laboratories within hospitals; and

4. Effective August 1, 1992, a .3 percent gross revenue tax on long-term home health care programs.

From October 1, 1992 through September 30, 1993, the taxes have generated estimated revenue of $26,275,000. This results in $13,137,500 of FFP. This information was obtained through estimates by our office. Since the revenue associated with these tax programs has not been reported on the form

HCFA-64.11A, provide HCFA with the tax revenue associated with the classes listed above for the period October 1, 1993, through June 30, 1994.

Section 1903(w)(7) of the Social Security Act specifies nine classes of permissible health care services and providers. Section 42 CFR 433.56 of the implementing Federal regulation established ten additional health care-related classes.

The classes of assessed services mentioned above violate section 1903(w)(7) of the Social Security Act and section 42 CFR 433.56 of the implementing Federal regulation.

Before HCFA takes a disallowance associated with the impermissible classes, we request that you provide any information you may have to support the permissibility of the classes. Should you wish to submit a written response to me, please do so within 30 days from your receipt of this letter. Your timely response will be considered and incorporated in the final action. In addition, since these amounts are estimates, we will send financial reviewers, during the first calendar quarter of 1995, on site to audit State records to determine the specific amounts of the disallowance.

If you have any questions, please contact Arthur O'Leary, Associate Regional Administrator for Medicaid, at (212) 264-2511.

Sincerely,

/s/ WILLIAM TOBY, JR.

WILLIAM TOBY, JR.
Regional Administrator

[seal omitted]

DEPARTMENT OF HEALTH & HUMAN SERVICES
Health Care Financing Administration

Refer to

Region II
Federal Building
26 Federal Plaza
New York, NY 10278

December 19, 1994

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Commissioner
New York State Department of Social Services
Ten Eyck Office Building
40 North Pearl Street
Albany, New York 12243-0001

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This law amended provisions of Title XIX of the Social Security Act and established new limitations on Federal financial participation (FFP) when States receive funds donated by providers and revenues generated by certain health care related taxes.

The law also established a definition of the types of health care related tax revenues States are permitted to receive, without a reduction in FFP. Such taxes are broad based taxes which apply to all health care providers in a given class in a uniform manner and which do not hold taxpayers harmless for their tax costs. Consequently, to the extent a State adopts a health care related tax program that otherwise meets the statutory provisions, the States will have acted within the limits of the law.

HCFA is aware that the State of New York imposes the following taxes:

1. A general hospital tax, effective 1/1/91 through 12/31/93, which averaged 5.48% Statewide on hospital rates for all non-Medicare and non-Medicaid payers,

2. A general hospital tax, effective 1/1/91 through 12/31/93, applied at a rate of .23% on hospital rates for all non-Medicare and non-Medicaid payers,

3. A general hospital tax, effective 1/1/91 through 12/13/93, applied at a rate of .235% on hospital rates for all non-Medicare and non-Medicaid payers,

4. A general hospital tax, effective 1/1/91 through 12/31/93, applied at a rate of .1% of gross receipts from all patient care services,

5. A patient care services tax, effective 1/1/91 through 3/31/94, applied at a rate of .6% on gross

receipts from all patient care services. This tax is imposed on the following entities: general hospitals, residential health care facilities (NF), diagnostic and treatment centers, certified home health agencies, long-term home health care programs, personal care providers, ICFs/MR, mental retardation day treatment providers, mental retardation specialty and residential treatment facilities for children,

6. A residential health care facility (NF) tax, effective 4/1/92 through 3/31/94 applied at a rate of 1.2% of gross receipts.

7. An ICF/MR tax, effective 4/1/92 through 3/31/93, applied at a rate of 2.4% of gross receipts. The tax is also imposed on mental retardation day treatment centers and mental retardation specialty hospitals.

8. An HMO tax, effective 7/1/92 through 12/31/92, applied at a rate up to 9% of inpatient hospital reimbursement rates for HMOs,

9. A commercial insurance tax, effective 4/1/92 through 3/31/93, applied at a rate of 11% on inpatient reimbursement rates for commercial insured,

10. A charge/fee of $.50 per triplicate prescription form, effective 4/1/76. This form is used by certain providers dispensing certain controlled substances.

11. A narcotics dispensing fee, effective 4/1/89, applied at a rate from $50 to $600 charged against dispensers of controlled substances, including general hospitals and nursing homes,

12. An application fee of $1,000 for CON submission, plus an additional fee of .4% of project costs for projects going before the State Hospital Review and Planning Council, effective 4/1/89,

13. A mortgage development fee of .9%, and a mortgage operational fee of .2% of the mortgage loan amount charged against eligible hospital and nursing home borrowers, effective 5/19/72,

14. A Statewide Planning and Research Cooperative System (SPARCS) fee, which is a flat fee established annually by the State, and is charged uniformly to all general hospitals, effective 1/1/86. There is a maximum cap of .1% of total costs.

15. A mortgage closing fee and mortgage refinancing fee of .9% of mortgage closing and .5% of mortgage refinancing, of both Federally aided mortgage loans and loans through the New York State Dormitory Authority, applied to health care facilities, effective, 4/1/89.

Section 1903(w)(3)(B) of the Social Security Act specifies that the term broad based health care-related tax means a health care-related tax which is imposed with respect to a class of health care items or services or with respect to providers of such items or services and which, is imposed at least with respect to

all items or services in the class furnished by all non-Federal, nonpublic providers in the State (or, in the case of a tax imposed by a local unit of government, the area over which the unit has jurisdiction) or is imposed with respect to all non-Federal, nonpublic providers in the class and is imposed in a uniform manner.

Section 1903(w)(3)(C) of the Social Security Act and 42 CFR 433.68(d) specify that a tax is considered to be imposed uniformly, if in the case of a tax consisting of a licensing fee or similar tax on a class of health care items or services (or providers of such items or services), the amount of the tax imposed is the same for every provider providing items or services within the class; if in the case of a tax consisting of a licensing fee or similar tax on a class of health care items or services (or providers of such items or services) on the basis of the number of beds (licensed or otherwise) of the provider, the amount of the tax imposed is the same for each provider of such items or services within the class; if in the case of a tax based on revenues or receipts with respect to a class of items or services (or providers of items or services) the tax is imposed at a uniform rate for all items and services (or providers of such items and services) in the class on all the gross revenues or receipts, or net operating revenues relating to the provision of all such items or services (or all such providers) in the State; or in the case of any other tax, the State establishes to the satisfaction of the Secretary that the tax is imposed uniformly.

The taxes mentioned above do not meet the broad based and/or uniformity requirements contained in

section 1903(w)(3)(B) and (C) of the Social Security Act.

Therefore, in accordance with section 1903(w)(3)(E) of the Social Security Act and 42 CFR 433.72, please submit to HCFA, a request for approval of a waiver of the broad based and/or uniformity requirements for each of these tax programs. We request that you submit the request for waiver of the broad based and/or uniformity requirements for each of these tax programs within 30 days from your receipt of this letter. A letter, dated November 16, 1993, from the Medicaid Bureau Director to you outlined the procedure for requesting a waiver of these requirements.

If you have any questions, please contact Arthur O'Leary, Associate Regional Administrator for Medicaid at (212) 264-2511.

Sincerely,

/s/ WILLIAM TOBY, JR.

WILLIAM TOBY, JR.
Regional Administrator

MEDICAID TAX AND DONATION FACT SHEET

As States began exploring new sources of funding for their share of Medicaid expenditures, they began using donations and taxes from health care providers to draw greater Federal matching payments. As the use of these programs increased, the Federal Government's concern grew because States were able to adjust Medicaid payment rates to compensate providers for the cost of the donations or taxes.

On December 12, 1991, Public Law 102-234, "The Medicaid Voluntary Contribution and Provider Specific Tax Amendments of 1991" was signed into law.

Beginning January 1, 1992, this new law specifies that donations made by providers that are not bona fide and provider taxes that are not broad based, not uniform or that contain a hold harmless provision would result in a reduction in Federal matching payments.

On November 24, 1992, the Health Care Financing Administration (HCFA) published an Interim Final Rule in the *Federal Register*.

This interim final rule was revised based on comments received during the interim final rule comment period and consultation with States, as required by the law. On August 13, 1993, the Final Rule was published in the *Federal Register*.

Beginning October 1, 1993, the first quarter of the Federal fiscal year, States were required to report the tax and donation program revenue to HCFA on

the HCFA Form 64.11. This report is submitted quarterly.

State Medicaid Directors were reminded about the reporting requirements and informed of procedures for making application for certain waivers allowed under the regulation in a letter dated November 16, 1993.

To date, HCFA has identified 9 states which have implemented tax programs that appear to clearly violate the statutory provisions. These programs have projected estimated disallowances, through December 31, 1994, totalling $449,981,182.

In addition, we have identified 23 states (including seven of the nine above) which have implemented tax programs that are either not broad based or uniform. Seven states have submitted waiver requests to HCFA. These tax programs require the approval by HCFA of an application for a waiver of the statutory requirements. The permissibility of these taxes cannot be determined until the waivers are reviewed by HCFA.

To date, HCFA has received waiver requests from 11 States. In addition to the seven states which have waivers requests in process, 3 states have approved waivers and 1 state has a disapproved waiver request.

The states that have not already submitted a waiver request are receiving letters from the Regional Offices which request that they submit waiver applications for approval by HCFA of these tax programs.

For the tax programs that appear to violate the statute, we have requested that States submit within 30 days information to support the permissibility of the tax. In addition, HCFA will work with the States to determine the specific amounts of the disallowances.

For the tax programs that need the approval of a waiver, we have requested that the States submit the waivers within 30 days from receipt of the letter.

EXHIBIT 1

ESTIMATED DISALLOWANCE WITHOUT FURTHER ACTIVITY AS OF 6/30/94

STATE	DISALLOWANCE	% OF STATES' TOTAL MEDICAID EXPENDITURES
1. ALABAMA	UNKNOWN	UNKNOWN
2. ARKANSAS	$ 11,155,233	1.0
3. HAWAII	$ 11,004,974	2.1
4. ILLINOIS	$111,820,000	1.9
5. LOUISIANA	$112,475,280	2.7
6. MAINE	$ 6,500,000	0.6
7. NEVADA	$ 547,101	0.1
8. NEW YORK	$ 13,137,500	0.1
9. TENNESSEE	$120,714,142	3.4

TOTAL ESTIMATED AMOUNT OF DISALLOWANCE FROM END OF TRANSITION TO THE PERIOD ENDING 6/30/94= **$387,344,230**

PROJECTED AMOUNT OF DISALLOWANCE THROUGH 12/31/94= **$449,981,182**

EXHIBIT 2

PROJECTED ESTIMATED FFP THROUGH JUNE 30, 1994 ASSOCIATED WITH STATES WHICH REQUIRE WAIVERS, BUT HAVE NO REQUEST PENDING

1.	ALABAMA	$ 12,052,492
2.	DISTRICT OF COLUMBIA	$ 6,130,000
3.	HAWAII	$ 6,773,858
4.	ILLINOIS	$ 282,376,021
5.	INDIANA	$ 21,755,000
6.	KENTUCKY	$ 62,750,051
7.	LOUISIANA	$ 54,687,214
8.	MINNESOTA	$ 96,956,643
9.	MISSISSIPPI	$ 9,156,214
10.	MONTANA	$ 10,843,612
11.	NEW YORK	$955,375,500
12.	OHIO	UNKNOWN
13.	SOUTH CAROLINA	$ 20,131,266
14.	TENNESSEE	$ 380,950,000
15.	VERMONT	$ 4,249,920
16.	WISCONSIN	$ 22,535,581

EXHIBIT 3

PROJECTED ESTIMATED FFP THROUGH JUNE 30, 1994 ASSOCIATED WITH STATES WHICH REQUIRE WAIVERS, AND THOSE WAIVERS REQUESTS ARE UNDER CONSTRUCTION

1.	CONNECTICUT	$ 308,369,103
2.	FLORIDA	$ 95,840,777
3.	MASSACHUSETTS	$ 205,169,451
4.	MISSOURI	$ 392,233,074
5.	NEVADA	$ 12,093,879
6.	NEW HAMPSHIRE	$ 20,752,981
7.	UTAH	$ 2,800,000

THE WHITE HOUSE

Office of the Press Secretary

For Immediate Release August 11, 1997

PRESS BRIEFING BY
TREASURY SECRETARY BOB RUBIN,
OMB DIRECTOR FRANK RAINES,
DIRECTOR, NATIONAL ECONOMIC COUNCIL
GENE SPERLING

The Briefing Room

1:20 P.M. EDT

MR. BOWLES: Good afternoon. Let me talk to you first about some of the process matters that we went through in order to get here because I know a number of you have questions on that because we have had a lot of telephone calls over the last couple of days.

The budget team, which is behind me here, began working on this last Tuesday as soon as we received the list from the Joint Tax Committee. The entire budget team has been fully involved in this effort. We did receive input from numerous outside sources, as you can well imagine, and we began meeting with the President on Friday. We met a number of times on Friday; we met Saturday, Sunday, and again this morning.

I should point out that during the early drafts of the bipartisan balanced budget agreement there were any number of special interest provisions that were eliminated prior to the final draft going into place. Some of those that survived—of those that survived, a number of them we proposed and agreed with; some we agreed to allow to go forward as part of a deal. Some were close calls, frankly, for us, but simply didn't rise to the level of fully objectionable, and some we did, in fact, veto, as the President announced earlier.

Secretary Rubin is now going to talk to you about the tax provisions and give you some details on those, and then Director Raines will talk about the spending and then we'll take some questions.

Secretary Rubin.

SECRETARY RUBIN: Thank you, Erskine. Let me very briefly describe the two tax provisions that the President will be canceling. The first has to do with something called Subchapter F corporations and, basically, what this provision was intended to do was to allow investment firms and others that are trading in securities and have foreign subsidiaries to treat the interest and dividends on the stocks that are part of their trading business as the equivalent of active income. So that it would not be—this may be a little—it's perfectly clear? I can get worse, not better. I think I'm just going to do this this way and then you all can ask any question you like.

Basically, the idea was this. Let me try it a little bit differently. Investment companies and brokerage

firms and others who trade securities abroad felt, and I think rightly, that their interest and dividends on the trading security issue should be treated the same way as a profits of a manufacturing company, which meant that those profits should remain abroad and not be taxed in the United States until they were repatriated. Under current law that was not the case. And this Subchapter F provision was intended to accomplish that purpose.

It was a one-year provision and was drafted so broadly that it not only accomplished the intended purpose, but also would have resulted in the possibility of providing what, in effect, would be sheltered treatment for dividend interest that it was not intended to cover. That is to say the dividends and interests on investment securities.

And we served notice that were involved in the drafting as this went along that this was too broad in its drafting and—however, it retained the undue breadth. As a consequence, it was an appropriate candidate and the President, as you know, has cancelled it through the line item veto.

The second one—neither of these is particularly simple, as you can see. The second one was the one the President referred to with respect to farm co-ops, and as he said he is very sympathetic to the idea of what is known as value-added farming; that is to say, putting farmers in the position where through vertical integration they can get the benefits of processing and, therefore, greater price stability, and put themselves on a more secure footing.

What this was intended to do was to, in effect, provide an incentive for accomplishing that purpose. On the other hand, the way in which it was constructed, in our judgment, had two problems: one, it was inefficient. That is to say it would not only help small farmers, but it could also very well result in large processors getting the primary benefit of this or it could help very large co-ops that didn't need this assistance, so it was too broad in its possible effect, and as a result was an inefficient provision. Secondly, the way it was drafted had the possibility of enabling the sellers, the processors who were selling out to the co-ops to not only defer their income but in some cases possibly never to pay tax—or defer income tax rather, but in some cases never to pay tax. And that certainly was not, in our judgment, an appropriate objective.

So what the President said was that he would cancel this provision, but he would ask Secretary Glickman to work with the people who were interested in accomplishing this purpose and try to find a more efficient means of accomplishing the same purpose.

That, in essence, is a very brief, I hope transparent, discussion of the two tax provisions that were involved in the exercise of the line item veto.

Frank.

DIRECTOR RAINES: As you know, these were two bills passed by Congress. One was the Taxpayer Relief Act of 1997, and the Secretary of the Treasury just went over with you the cancellation there. I'm

going to handle the cancellation under the Balanced Budget Act of 1997.

The item that the President has canceled is a provision that provided special relief to the state of New York for provider taxes that had been determined by HHS to be illegal under a 1991 statute. What this would have done would be to permit New York to continue to levy these taxes and to use them to increase their federal match in the Medicaid program. By canceling the provision, New York will not be able to do so.

The 1991 law was intended to stop a practice whereby states had artificially boosted their federal match by having illusory—levying illusory taxes on hospitals and other providers, and then seeking—and treating that as a cost of the hospitals and then seeking federal reimbursement on this higher cost, which meant that they were able to obtain far more federal reimbursement than the actual money spent for health care. New York has three taxes that fall into that category and this provision would have made all three of those permissible, while keeping similar taxes in other states impermissible under the law.

And in canceling this provision, we believe that the President has put all the states on an even basis. And there is one part of the New York circumstance that we believe can be dealt with administratively, which we are going to be working with them to do that on one of the three taxes. And so we think we can deal with that problem. But otherwise, the cancellation simply leaves the state of the law the way it was before Congress acted.

Q Just a quick question, for those of us from New York. Can you just explain what the three taxes are and which one is the one that you can deal with administratively?

DIRECTOR RAINES: Sure. There is one tax that is a regional tax that has a different impact depending on what region of New York you're in. That is the one that we believe we can deal with administratively. There are other taxes that failed to meet the requirement that they be both broad-based and uniform. And then there's taxes that apply to classes of providers that you're not allowed to include in the tax. So they had these three types of taxes that they'd imposed, the first one, the regional taxes, one that we think we can deal with administratively.

Q They are all on providers only?

DIRECTOR RAINES: All of these are on providers. Again, remember, they are not real taxes, they're never collected. It's simply an obligation that they would put on a hospital to pay over money that was given to them by the state. They then come to the federal government and say, look, we now have this big expense, and then they reimburse the hospital for the amount of money that they paid in the tax. So it's simply a way to increase the amount of the claim on the federal Treasury with no practical effect on the hospitals except in some cases they are allowed to keep some of the extra funds.

Q The effect of that, would New York, say, have to repay any money to the federal government because of this?

DIRECTOR RAINES: The effect of this will be that New York will be treated the same as the other states. And HHS is in the process now of resolving with those states how they will be treated with regard to the implications of these taxes in the past.

Q There may have to be a pay-back?

DIRECTOR RAINES: Well, again, that's something that HHS will work out with them, similar to the way they're working it out with the other states.

Q If a tax is never paid why are you going to deal with one portion of it administratively? Could you explain?

DIRECTOR RAINES: If this tax becomes permissible and becomes a real tax, then the state will no longer be simply reimbursing them for a phantom tax and it becomes a legitimate tax under the law, and so that we will no longer have the extent of gaming that we had prior to the 1991 law.

Q Mr. Raines, the President said in the statement that the real relevance of the line item veto will come with the appropriations bills. Suppose his action today does not serve as a deterrent in the cycle of FY'98 appropriations bills that are going to wend their way to the White House, just looking on past appropriations patterns, how much do you think the

line item veto over an annual cycle of appropriations will save the country?

DIRECTOR RAINES: I thinks it's impossible to say. Already I think there are fewer problems in the appropriations bills that have moved so far in Congress, and so we have already seen as a result of the bipartisan spirit a lot of the issues coming off the table. So I think it's impossible to speculate because we've already seen behavioral changes happening, and I don't think I could disaggregate which aspect of it is having which effect.

Q Well, just look at the FY'97 bills that are now law, if the President had had the line item veto, what would be your ballpark guess as to how much he would have stripped out?

DIRECTOR RAINES: It would just be a wild guess. We haven't done that exercise and I really wouldn't want to speculate on something where we haven't done any work.

Q Director Raines, could you estimate the value of the cost to New York of this? Because the figure being bandied about by the administration is $200 million, but there are people in New York saying it's a lot more. And also, you said that it leaves New York in the same situation, but New Yorkers say that New York gets one of the lowest Medicaid reimbursement rates and far lower than, say, a state like Arkansas. Could you address that as well?

DIRECTOR RAINES: Well, the New York reimbursement rate is 50 percent and there are a number

of states that are at 50 percent. It depends on your per capita income and the state, and so there are a number of states at 50 percent. The best estimate we have at the moment is really a CBO estimate where they have estimated the savings by this cancelation at $200 million. We haven't reestimated that provision yet and so I don't have any number other than the 200 that was used by CBO when Congress passed the provision.

Q Director Raines, could you explain who was responsible for inserting this language into the bill in the first place and why?

DIRECTOR RAINES: I don't know who, but I would assume it had something to do with people in New York. (Laughter.) The why I think is that there is—as you may know, over the years there have been constant efforts to utilize the Medicaid program as a way of financing—either increasing state reimbursements or financing other things. And this is an effort to try to stop the implementation of the 1991 law, and I think it probably is a sign that they believe that the law was about to be implemented that they sought protection.

Q Were there discussions with the congressional delegation from New York in the process of reaching the decision to cancel this item?

DIRECTOR RAINES: There were discussions with many people over the last several weeks about this and other provisions.

Q Did you hear a defense from the congressional delegation of this item?

DIRECTOR RAINES: I think we've—I've heard the defense. The defense that I have heard is that the Medicaid program is very expensive and the state would like to see additional reimbursement. And it's a very straightforward position that they would like to have a higher reimbursement and this is a way to do it. Our view is that this is an impermissible way to do it and would distinguish the state from any other state in exactly the same circumstance.

Q You have no idea if this was done at the behest of a Republican senator, Republican governor? You're saying you have no idea if this was inserted by a Republican senator on behalf of a Republican governor?

DIRECTOR RAINES: Well, as I recall, there is bipartisan delegation from the state of New York, and the senior-most member of the delegate I believe is a Democrat. So I don't think the politics of this is going to answer any questions as to where we came out. It really is the policy with regard to this provision, and this is a very consistent position of ours. This is nothing new. We've been taking this position throughout the administration. Everyone knows what our position is. Everyone knows that we found these provisions to be unlawful. We're simply being as consistent as can be. And when we see this provision that is contrary to it, the President decided to cancel the provision.

So the only news here is that the current effort to enforce the law involves cancellation of a provision of law, but we've been administratively implementing the '91 law all along.

Q Do you have any evidence that New York is using the Medicaid money in the way that you've suggested, to finance other projects unrelated to health care?

DIRECTOR RAINES: We have made a determination that they were using the money in a way that was not the way contemplated by the Medicaid law.

Q Can you give us some examples?

DIRECTOR RAINES: Simply that they've been levying these taxes and having the reimbursements and artificially increasing their federal match. So even if the use of it was not for something we would disagree with, the fact of the matter is, the Medicaid program is not there to be a catch-all financial instrument for anything that the state may view as to be a worthy purpose.

Q I'm just anticipating the state's argument here. They're likely to say, this decision is going to reduce the amount of money we can spend for health care for poor people. And that hardly seems the kind of pork that the line item veto is invented to deal with, so why use it on this particular provision?

DIRECTOR RAINES: That's been an argument that's been used over the years. And, in fact, when

you really look to see, did they, in fact, expand the Medicaid program when they put into effect these provisions, did they increase benefits to people, almost invariably the answer is no. So while we're sympathetic to the fiscal concerns of the state, we don't think that they should be resolved through special treatment in the Medicaid program.

Q So you're saying there will be no negative impact on Medicare users from the effects of this veto?

DIRECTOR RAINES: This is a Medicaid program, and we do not expect that the state will change—and we've had no indication from them that they would change the benefits available under the Medicaid program.

Q Can you clarify something that came up in the review of the farm co-op measure, as to whether or not this fellow down in Texas—

SECRETARY RUBIN: Simmons?

Q —yes—as in fact going to be the principal beneficiary of this measure?

SECRETARY RUBIN: I gather there is some question as to how it would have affected him, but let me tell you, in our analysis, that was not what we focused on. We focused on exactly what the President has said, which was, what effect would this have on farmers and on co-ops and on processors. We did not base our decision on Mr. Simmons, so that—

Q The answer to that question, though?

SECRETARY RUBIN: I have seen his argumentation. I've seen argumentation the other way. I truly don't know. I don't know enough about his specific tax situation to know what effect it would have on him, but that was also not the basis on which the decision was made. The basis on which the decision was made was exactly what I explained before and the President in more general teams discussed at his press conference.

Q Would you classify the measures that were the —

Q Can I just follow up on that real quickly and ask about the revenue estimate estimates associated with the food processing provision? The Joint Tax Committee's estimate suggests that as much as perhaps even 80 percent of the 10-year revenue lost to the Treasury from this provision would be associated with just—I just it's actually as much as 60 percent.

SECRETARY RUBIN: Well, they said $84 million, of which 60 was this, I think.

Q Sixty, that's right, would be due solely to this specific transaction.

SECRETARY RUBIN: Correct.

Q Number one, does that look about right to you and to the Office of Tax Analysis? And number two, if it is correct, I mean, doesn't that suggest that there would be hardly any cooperatives actually availing

themselves of this particular provision and it wouldn't really be a major revenue loser?

SECRETARY RUBIN: Clay, we had a slightly higher estimate. I think our estimate was about $98 million, if I remember correctly, or something like that. Theirs, as you said, was 84 million. They said that 60 was Harold—was the Simmons transaction. But the answer is that—

Q Do you have a figure for the Harold Simmons transaction from the Treasury as well?

SECRETARY RUBIN: John, do we? No, we do not. But I think the point remains the same, Clay. The President was sympathetic to the purpose and said that the value-added farming that it was trying to encourage was a good idea. But the problem is the way this was drafted was inefficient and would also result in some people possibly never paying taxes rather than just deferring tax, and that was the basis for cancelation.

Q Would you classify the two items that you described as that somebody intentionally slipped in and it was written that way to have a purpose that you are now trying to avoid, or were these mistakes and flaws?

SECRETARY RUBIN: I'm not going to impute purpose. I'm just describing the analysis. And based on that analysis—

Q Can anybody up there talk about that? Is this pork that was intentionally put in, or are these mistakes?

SECRETARY RUBIN: Others may want to comment differently, but I don't see what you gain by trying to impute purpose. I think the purpose—the question is, analytically, how does this compare to the criteria the President mentioned, and based on those criteria, these seemed appropriate to cancel.

Q Mr. Bowles, it's kind of a follow-up to this earlier question, and I'm a little confused. The President said, anything that he vetoed would have to be things that were not part of the agreement. So my question is, first when did you know that these things were in there? Did you know them—did you know this before the President and the administration agreed to this deal, or was it after? And if you knew it before, how could you risk—if these things are so important, how can you risk that line item veto might be declared unconstitutional and these things would become law? How can you risk that?

MR. BOWLES: Well, let me just state from the viewpoint of those of us who were actively involved in the negotiation, that these items were not discussed at our level. I think there was some discussion among the staffs about some of these items, but at are our level none of these were discussed. Had they been discussed and had we agreed to them, then we would not have exercised the line item veto in this regard.

Q Well, did you know they were in there at the time the administration agreed with Congress to go ahead with this? Or did you find out after the fact?

MR. BOWLES: I was not aware of any of the three of these because none of these three were discussed at our level and that's why we felt it appropriate to use the line item veto in that regard. Some of these were discussed at lower levels. We expressed objections to some of the way they were formatted and the way they were formulated, but they continued to go forward. We did not discuss them at our level.

Q I have to try follow up. I don't think I'm getting an answer to my question. Did you know—by the time the administration agreed with House Republicans, did you know these things were in there or did you become aware of it afterwards?

MR. BOWLES: I think I've tried to answer that question for you. If you look at the document, it's about that thick, okay? And none of these items were discussed at the level that Bob and Frank and I discussed them with the Republicans. However, each of them, I think, probably were discussed at lower levels. We expressed objection to them, and they ended up going into it anyway.

Q Mr. Bowles, some analysts think that one of the real powers of the line item veto doesn't come on budget, tax, and spending issues at all, but on unrelated issues where the President can use the threat of a line item veto to get a recalcitrant member in line on some other issue. Do you think that's true?

MR. BOWLES: Well, the President has said that was his experience in Arkansas with the line item veto, that he only had to actually use it a few times, but having the very threat of it was enough to get some highly objectionable provisions removed before they actually got into the bill.

Q But could it be used to, say, to get Jesse Helms to give William Weld a hearing—(laughter)—by threatening to veto North Carolina pork?

MR. BOWLES: I can't imagine we would threaten to veto anything from North Carolina—(laughter)—but we certainly haven't talked about that yet.

Q A follow-up to that. Was there—

Q —expected legal challenge—first of all, do you feel that since there is a mix now from tax and spending that you're going to be on stronger ground? And second, will one of these affected parties have to bring suit? Is that the way you all anticipate it would work?

MR. BOWLES: I think Frank can probably speak to who actually can bring suits, since he is one of the named people in the original action. But we really looked at each one of these on their own merits and their own merits alone, and not whether one was a tax provision or a spending provision.

DIRECTOR RAINES: The gist on the factual question, what the Supreme Court held in their last decision was it required someone who was actually

affected by the President's action to bring suit. So we don't know that there will be a suit, but anyone who can claim that they were harmed as a result of this would have standing. They would then have to make a case.

Q Could that be New York State, for instance, or would that have to one of the hospitals?

DIRECTOR RAINES: The courts will sort out who, among all the people, would have standing. But, clearly, the President has now acted. He has acted under the very clear advice from the Justice Department that the statute is constitutional. It is our fundamental belief it is a constitutional statute and one that has great history behind it. And we will move forward in the expectation that the statute will be held to be constitutional as we look at other bills that are presented.

Q When did you decide that these would be the three? When was that decision made?

MR. BOWLES: The President made the final decisions this morning.

Q Mr. Raines, if I could follow up on the standing question. The original plaintiffs on the Hill have different opinions as to whether they have standing now that the veto has actually been exercised. Would your legal advisors tell you that a lawmaker would have standing?

DIRECTOR RAINES: I don't know what our legal advisors would say on that. I think you're going to

have to—I think I would direct that really to the Justice Department—

MR. MCCURRY: They advised us not to answer that.

DIRECTOR RAINES: Right—because you're getting into very esoteric aspects of standing law.

Q Back to Medicaid. Mr. Raines, has any other state—this ruling that shut down the pass-through tax and the draw-down—the law applied to all 50 states. Since the implementation of that law, has any other state sought to get out of it in this way?

DIRECTOR RAINES: Not to my knowledge.

Q Is there any connection between the fact that Senator Moynihan was involved in the constitutional challenge and he's from New York State? In your choice. In talking about the deterrent power of the line item veto and his political—

DIRECTOR RAINES: No.

Q Also, Mr. Raines, could you explain why—there were several other geographic Medicaid provisions that were put in this bill, for instance, the Alaska one which raised the reimbursement rate. Why was this one more objectional to the President, let's say, than the Alaska one?

DIRECTOR RAINES: As the President pointed out, this would have put into law a bad policy. It is the use of these taxes to escalate the federal reimburse-

ment is bad policy. Congress has determined that and this would simply grandfathered a state in to continue that bad policy.

Q You also, I think, had sent a letter to the Hill saying that the Alaska provision was unwarranted and bad policy. Do you know why you chose—

DIRECTOR RAINES: No, what we said was that we thought that if you're going to go about changing the federal reimbursement at the state level, that it should be done broadly. And not that there were certain—there weren't states that had a legitimate argument that their rate ought to be a different rate, but we thought that it would be better practice to do it broadly. That doesn't mean if they do it narrowly you would say, well, then let's reject this narrow application of what you may believe to be a good policy.

Q Mr. Bowles, could you characterize the debate that took place within the White House whether to even use this or not? And also, already Mr. Gingrich is saying that this is petty politics. Are you perhaps risking losing the spirit of bipartisanship over what really amounts to three fairly insignificant amounts when you look at the overall budget deal?

MR. BOWLES: I'll answer your questions in order. First of all, we did have a number of discussions within the White House on various provisions—on whether or not they really rose to the level that we wanted to use the line item veto. But we looked at each separate provision based on its own merit.

Secondly, I have had discussions with the Speaker about the use of the line item veto. He was aware that we did plan to use it, and this morning I spoke with him and told him the items on which we did plan to use it. We do—we have accomplished a lot going over the last year with a real bipartisan spirit here, with real cooperation between the White House and the Congress, and we have a very heavy agenda going forward for the fall. And I expect we will continue to see that bipartisan spirit go forward.

Republicans and Democrats, going back over time, have been proponents of the line item veto. It's actually when you have to use it is when you get some disagreement.

Q What did Mr. Gingrich say to you?

MR. BOWLES: When I told him the specific items that we had decided to use, he thanked me for calling him and left it at that.

Q Mr. Bowles, are you going to stay on for this heavy agenda in the fall, or are you leaving?

MR. BOWLES: I'm going to be here until I finish these to-do items that are on this list the President gave me back in November of last year.

Q How long is that?

Q Did Mr. Gingrich—

MR. BOWLES: Basically, I think he was actually on the treadmill when I talked to him.

Thank you.

Q Can you tell us what happens to the money that was saved here? Does it go into a lockbox for deficit reduction or—

DIRECTOR RAINES: Yes.

Q So that money is not segregated and will be spent —cannot be spent—

DIRECTOR RAINES: Cannot be spent, that's right.

Q Mr. Raines, could we get an answer to Allison's question before about Alaska versus New York? Is what you were saying that if the provision had favored —if the bill had used the same mechanism to help New York that was used to help Alaska, that then you would not have objected?

DIRECTOR RAINES: If the—they are two totally different cases. In Alaska's case, there was an effort to change directly the reimbursement rate.

Q If the law included an attempt to raise New York's reimbursement rate directly to capture that same amount of money, would you also have objected?

DIRECTOR RAINES: I don't know. It's not something we looked at. I don't want to speak for what has been a very good group process or speak for the

President on something not presented to him, so it would be just speculating. But I gave you the rationale by which we examined it, and the President did as well, so I think you'll just have to infer from that. But I don't want to jump ahead of my colleagues or the President on what he might have done in another set of circumstances.

Q A quick question for Mr. Rubin and Raines. Were these three provisions on your original Treasury and OMB statements of administration policy of provisions you would recommend a veto over all of the—

DIRECTOR RAINES: We did not make any threats of line item vetos during the process at all.

Q But you had—both of you had lengthy lists of provisions that you objected to.

DIRECTOR RAINES: I believe this item was, in fact, mentioned in one of my letters. The New York provision—on the tax side, we did not get to the level of the size of these kinds of items.

Q Gene, could you take one question, just to repeat Cheryl's question, which I think was legitimate? Are these particular items that were canceled today—do they fit that description of pork, which to most voters the line item veto was designed to remove from the bill? Is this really pork that you're going after today?

MR. SPERLING: I think what Secretary Rubin was saying was that we looked at the item on merit and policy without asking what the motive was. But I

think the important point for the deterrent effect for the future is that whether some of these provisions were purposely crafted to allow for certain abuses, or they were just accidentally drafted that way, the effect either way is that from now on people know that these provisions will get a high level of scrutiny. And already this week, we have seen provisions have to be defended publicly that never before would have had to be scrutinized under the light of day.

So every single item in the future now, everybody is going to know that if they put a provision that is sloppily drafted or drafted to promote a special interest or overly narrow, that they will have to defend it publicly and that it may be subject to a presidential line item veto. And it is that very powerful deterrent effect that will have, I think, the considerable savings, both in terms of money to the taxpayer, but also savings in the sense of having good policy drawn for the public interest as opposed to bad policy that has loopholes and allows for more special interests?

Q Want to bet? (Laughter.)

MR. MCCURRY: Thanks, Gene. Thank you.

END 1:50 P.M. EDT

[seal omitted]

DEPARTMENT OF HEALTH & HUMAN SERVICES
Health Care Financing Administration

Washington D.C. 20201-0001

OCT 9 1997

Dear State Medicaid Director:

We are writing to inform you of several policy interpretations which the Health Care Financing Administration (HCFA) has recently adopted. These interpretations relate to the Medicaid Voluntary Contribution and Provider-Specific Tax Amendments of 1991, Pub. L. No. 102-234 § 2(a) (codified at section 1903(w) of the Social Security Act (the Act)), and related regulations, and were adopted as part of a review of HCFA's policies in the area of provider taxes.

As you know, the Medicaid Voluntary Contribution and Provider Specific Tax Amendments were enacted to limit Federal financial participation (FFP) in States' medical assistance expenditures when the States receive funds from, among other sources, impermissible health care related taxes. Under the Act, States may continue to receive FFP with respect to "broad based" and "uniform" health care related taxes. According to section 1903(w)(3)(B), a broad based health care related tax means a health

care related tax which is imposed with respect to a permissible class of items or services on all providers in that class. In addition, under section 1903(w)(3)(C) of the Act, a uniform health care related tax means a tax which is imposed with respect to a permissible class of items or services at the same rate for all providers. For those taxes which are not broad based or uniform, the Secretary may grant waivers if she finds that the taxes in question are "generally redistributive," pursuant to section 1903(w)(3)(E) of the Act.

In this letter, we first clarify HCFA's interpretation of the requirement that health care related taxes be applied uniformly. Second, we clarify that, when the Secretary has granted a waiver with regard to a health care related tax because she has concluded that the tax is generally redistributive, a later uniform change in the rate of tax will not require the State to submit a new waiver request. Third, we are reminding States of their opportunity to propose additional classes of providers, items, or services which the Secretary may consider including as permissible classes. Fourth, we are reminding States that all provider related donation revenue and health care related tax revenue, which includes licensing fee revenue, must be reported to HCFA on the HCFA-form 64.11A. Lastly, we commit to working with States to consider ways, including legislation, to expedite the identification of impermissible taxes and end their use.

First, with regard to the requirement that health care related taxes be uniformly imposed, the implementing Federal regulation at 42 C.F.R. § 433.68(d)

(iv) specifies that a health care related tax will be considered uniformly imposed if the tax is imposed on items or services on a basis other than those provided by statute, and the State establishes to the satisfaction of the Secretary that the amount of the tax is the same for each provider of such items or services in the class. We are clarifying that HCFA interprets 42 C.F.R. § 433.68(d)(iv) to include health care related taxes on the occupied beds of a facility or the patient days of a facility. HCFA has concluded that, to the extent the rate of a health care related tax is the same for each occupied bed or patient day and the tax is applied to all provided in the permissible class of services, a health care related tax program based on occupied beds or patient days will be considered uniformly applied. Previously, HCFA had interpreted the Act to require that the tax be applied to all beds or all days to be considered uniform.

Second, where States have sought and obtained waivers for existing health care related tax programs, HCFA is clarifying that a uniform change in the rate of tax will not require a new waiver. To the extent a State makes no other revisions to an existing health care-related tax program (e.g., modifications to provider or revenue exclusions), HCFA would not view a uniform change in the tax rate as a new health care related tax program.

Third, section 1903(w)(7)(A)(ix) of the Act states that the Secretary may establish, by regulation, classes of health care items and services, other than those listed by statute. The implementing regulation, at 42 C.F.R. § 433.56 specifies 10 additional permissible classes of items and services. In addition, the

preamble to the implementing regulation indicates that the Secretary will consider adding additional designations and that any proposed class meets the following criteria: 1) the revenue of the class is not predominantly from Medicaid and Medicare (not more than 50 percent from Medicaid and not more than 80 percent from Medicaid, Medicare, and other Federal programs combined); 2) the class is clearly identifiable, for example, by designation through State licensing programs, recognition for Federal statutory purposes, or inclusion as a provider in State plans; and 3) the class is nationally recognized rather than unique to a State. This is a reminder and an invitation to States that they may identify additional classes.

Fourth, section 1903(w)(7)(F) of the Act defines the term "tax" to include any licensing fee, assessment, or other mandatory payment. Therefore, any licensing fee applied to the items or services listed by statute and/or regulation must comply with the law. Furthermore, section 42 C.F.R. 433.56(a)(19) requires that for health care items or services not listed by regulation on which the State has enacted a licensing fee or certification fee, the fee must be broad based, uniform, not contain a hold harmless provision, and the aggregate amount of the fee cannot exceed the State's estimated cost of operating the licensing or certification program. Section 42 C.F.R. 433.68(c)(3) states that waivers from the uniform and broad based requirements will automatically be granted in cases of variations in licensing and certification fees for providers if the amount of such fee is not more than $1,000 annually per provider and the total amount raised by the State from the fees is used

in the administration of the licensing or certification program. This is a reminder to States that any licensing or certification fee imposed on providers of health care items or services is considered a health care related tax.

Furthermore, section 1903(d)(6)(A) of the Act requires that States include in their quarterly expenditure reports, information related to provider-related donations and health care-related taxes. This is a reminder to report all provider-related donation revenue and health care-related tax revenue on the HCFA-form 64.11A.

The Administration remains committed to ending the use of impermissible taxes. Failure to end their use undermines the integrity of the Medicaid program and would be unfair to those States that are in compliance as well as to the taxpayers who pay for the program.

HCFA will continue to apply the current provider tax laws. As a part of this process, HCFA will have discussions with States individually to understand their existing provider taxes and, where necessary, to develop better compliance plans that recognize the challenges that States may face.

The Administration's goal is to end the use of impermissible taxes as soon as possible. To achieve rapid and full State compliance, it is willing to work with States to resolve impermissible tax liabilities. The Administration believes that this will be facilitated by legislation that codifies the tests to determine that a tax is permissible and concentrates in the

Department greater authority to work with States coming into full compliance. In the development of this legislation, the Administration will work with States, the National Governors' Association, and Congress to address the concerns States have raised with respect to current law. If, however, legislation is not enacted by August 1998, the Secretary will move forward to complete the process already begun to apply with full force the current law.

If you have any questions concerning these policy clarifications, please contact your regional office.

Sincerely,

/s/ SALLY K. RICHARDSON

SALLY K. RICHARDSON
Director
Center for Medicaid and State Operations

cc: All Regional Administrators

All HCFA Associate Regional Administrators
Division of Medicaid and State Operations

Lee Partridge
American Public Welfare Association

Joy Wilson
National Conference of State Legislatures

Jennifer Baxendell
National Governors' Association

[seal omitted]

DEPARTMENT OF HEALTH & HUMAN SERVICES
Health Care Financing Administration

Press Office
Washington D.C. 20201-0001

STATEMENT BY SALLY RICHARDSON
DIRECTOR, CENTER FOR MEDICAID AND
STATE OPERATIONS
HEALTH CARE FINANCING ADMINISTRATION

Thursday, October 9, 1997

HCFA Center for Medicaid and State Operations Director Sally Richardson issued the following statement regarding today's policy clarification on state provider taxes used to obtain federal matching funds for Medicaid.

We have a responsibility to make sure that state taxes collected from health care providers and then used to generate federal matching funds for Medicaid are levied in a way that is fair and equitable among all states. Permitting some states to use improper provider taxes to obtain federal funds threatens Medicaid's fiscal integrity and is unfair to states that play by the rules.

We are today clarifying policy on taxes collected from health care providers based on patient days or occupied beds. This action makes clear that certain taxes are acceptable in 10 states that have asked us for waivers. Because of the complexity of the law there are states that have other taxes that still require review.

Given the outstanding questions, we are today announcing our intention to work with Congress and the states to enact legislation that codifies the tests for whether a state provider tax is permissible. This legislation will also enhance the secretary's authority to resolve current liabilities for states that come into full compliance with the law. We sincerely hope such legislation will expeditiously end the use of impermissible taxes. However, if such legislation is not passed by next August, HCFA will apply with full force the current policies.

We realize this is a big undertaking, and stand ready and willing to work with Congress and the states in this effort.

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FACT SHEET ON MEDICAID HEALTH CARE-RELATED TAXES

October 9, 1997

Medicaid, enacted in 1965, is a Federally-guaranteed health insurance program for certain low-income individuals, primarily pregnant women, children, the elderly and the disabled. It is a state/Federal partnership where the Federal government sets broad eligibility standards and pays states a portion of their Medicaid costs. States must commit funds in order to receive Federal financial participation (FFP). The source of certain State funds has been contentious, as described below.

BACKGROUND

During the late 1980s, many States established new taxes that had the effect of increasing their Federal Medicaid funds without using additional State resources. Typically, States would raise funds from health care providers (through provider taxes or "donations"), then pay back those providers through increased Medicaid payments. Since the Federal government pays at least half of Medicaid payments, the provider taxes or donations would be repaid in large part by Federal matching payments. Using this mechanism, the State realized a net gain because it had to repay only part of the provider tax or donation it originally received.

The widespread use of these financing mechanisms contributed to the extraordinary increases in Federal Medicaid expenditures in the late 1980s and early 1990s. One report found that provider tax revenue

rose from $400 million in 6 states in 1990 to $8.7 billion in 39 States in 1992. There was a similar increase in Federal Medicaid spending, which more than doubled between 1988 and 1992, with an average annual rate of over 20 percent. The number of people served by Medicaid did not rise by nearly so much.

In response to this unprecedented drain on the Federal Treasury, Congress passed "The Medicaid Voluntary Contribution and Provider Specific Tax Amendments of 1991" (Public Law 102-234). The first stand-alone piece of Medicaid legislation in the program's history, this law permits States to use revenue from health care-related taxes to claim Federal Medicaid matching payments only to the extent that these taxes are broad based (i.e., applied to all providers in a definable group); uniform (i.e., same for all providers within the group); and are not part of a "hold harmless" arrangement (i.e., the taxes are not devised to repay dollar-for-dollar the provider who was initially assessed). The law also precluded States from using provider donations, except in very limited circumstances. In addition, the law introduced limits on how much States could pay hospitals through the disproportionate share hospital (DSH) program—the primary way that States repaid their provider taxes or donations.

The final regulation for this law was published in 1993 after extensive consultation with the States and the National Governors' Association. The regulation defined which taxes are permissible, HCFA's methodology for determining permissibility of taxes, and a process for requesting waiver approval for tax

programs that are either not broad based and/or uniform.

Since the regulation, HCFA has communicated with States—through letters, a national conference, and State contacts at the regional level—about the provider tax policies. However, given the complexity of health care financing, some issues intended to be resolved by the 1991 law, the 1993 regulations, and subsequent HCFA interpretations are still questioned by some States. This has led to a review by HCFA of its interpretations of these policies.

POLICY CLARIFICATIONS

Today, the results of HCFA's review of its interpretation of the provider tax law and regulations is being described in a State Medicaid Directors' letter and a *Federal Register* notice. HCFA has determined that several changes in its implementation of the Medicaid provider tax provisions are appropriate, as described in today's letter to Medicaid Directors (dated October 9, 1997). First, HCFA will clarify its interpretation of taxes that are considered uniform. It will permit taxes on occupied beds or patient days to be considered uniform (previously, only taxes on all beds and all days were considered uniform). Second, the letter states that States do not need to submit a new waiver request for a tax subject to an existing waiver if there is a uniform change in the tax rate. The letter also reminds States that they may suggest additional classes of providers to qualify as "broad based" and that they should submit quarterly reports on their provider taxes and donations. These clarifications have resulted in the determination that

certain taxes in 10 States are permissible and require no further review.

In addition, HCFA will publish in the October 10, 1997 *Federal Register* a correcting amendment to the provider tax regulation regarding its interpretation of the uniformity test. It corrects the threshold for allowable tax programs based on regional variations, enacted and in effect prior to November 24, 1992. The correction is to conform the regulation to HCFA and Congress's intent to recognize such taxes as generally redistributive.

PLANS FOR ENDING THE USE OF IMPERMISSIBLE TAXES

In its effort to apply the law and end the use of impermissible providers taxes, HCFA will open discussions with the States individually to understand better their specific provider taxes and their issues resulting from the current law.

The Administration's goal is to end the use of impermissible taxes as soon as possible. To achieve rapid and full State compliance, it is willing to work with States to resolve impermissible tax liabilities. The Administration believes that this will be facilitated by legislation that codifies the tests to determine that a tax is permissible and concentrates in the Department greater authority to work with States to resolve impermissible tax liabilities in return for States coming into full compliance. In the development of this legislation, the Administration will work with States, the National Governors' Association, and Congress to address the concerns States have raised with respect to current law. If, however,

legislation is not enacted by August 1998, the Secretary will move forward to complete the process already begun to apply with full force the current law.

It is our hope that States will be responsive and cooperative so we can resolve these issues in a mutually satisfactory way.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civ. No. 97-2393 (TFH)

THE CITY OF NEW YORK, ET AL.,
PLAINTIFFS

v.

WILLIAM J. CLINTON, ET AL.,
DEFENDANTS

Civ. No. 97-2399 (TFH)

NATIONAL TREASURY EMPLOYEES UNION,
ET AL., PLAINTIFFS

v.

UNITED STATES OF AMERICA,
DEFENDANT

Civ. No. 97-3463 (TFH)

SNAKE RIVER POTATO GROWERS
INC., ET AL., PLAINTIFFS

v.

ROBERT E. RUBIN, DEFENDANT

DECLARATION OF SARAH VAN LEER

I, Sarah van Leer, hereby declare under penalty of perjury as follows:

1. I am a Senior Attorney in the Division of Legal Affairs, Bureau of House Counsel, New York State Department of Health (DOH). This Declaration is based upon personal knowledge and information received in my official capacity and is submitted at Plaintiff's request for the purpose of responding to allegations made in the Declaration of Charlene Brown dated November 12, 1997, as part of Defendants' Motion to Dismiss. In this and my prior role in the Counsel's office in the New York State Department of Social Services, I have worked since late 1992 to ensure that New York State ("New York" or "the State") complies with the Medicaid Voluntary Contribution and Provider Specific Tax Amendments of 1991 ("Provider Tax Amendments"), Pub. L. 102-234, 105 Stat. 1793, and related regulations. 42 C.F.R. Part 433, Subpart B. My responsibilities have included analysis of Federal Medicaid law and regulations, review of New York's health care provider tax waiver applications, discussions with the U.S. Health Care Financing Administration ("HCFA"), drafting and negotiation of the canceled section 4722(c) of the Balanced Budget Act of 1997, and related matters.

2. New York has imposed a number of taxes, fees and assessments on hospitals and other health care providers such as nursing homes, health maintenance organizations, and health clinics. The tax on hospitals dates since the early 1980's. Taxes on other types of health care providers have been implemented over time up through the present. Revenue from these health care provider taxes and assessments has supported an array of State health care programs for the poor. These include a program that provides health insurance for uninsured children; partial

compensation to hospitals that provide high volumes of free care to the uninsured; support for primary care physician and other health practitioner training; funding for a comprehensive AIDS Drug Assistance Program that subsidizes or pays for AIDS drugs for those without insurance; compliance with Federal disproportionate share payments to hospitals requirements; and others.

3. As described in paragraph 4 of Charlene Brown's Declaration submitted in support of Defendants, Motion to Dismiss, the Provider Tax Amendments require that a state's health care provider taxes be broad based, uniform, applied to permissible classes of health care providers, and lacking in hold harmless provisions. A state is permitted to submit requests to waive certain provisions of the Amendments if its taxes do not meet these statutory criteria. Whether such waivers are granted is governed by Federal Regulations at 42 C.F.R. Part 433.50 et seq.

4. The penalty if a health care provider tax is found by HCFA to be impermissible is a reduction in a state's allowable Medicaid expenditures by a dollar amount equal to the revenues collected from the impermissible tax, which results in a loss of federal financial participation ("FFP"). It is generally believed by HCFA (with whom the State does not concur) that all health care provider taxes result in a matching Federal Medicaid dollar reaching the state treasury, thus justifying the reduction in FFP for a tax deemed impermissible. This reduction in FFP is called a disallowance.

5. By two letters dated December 19, 1994, HCFA notified New York:

> The [15] taxes mentioned...do not meet the broad based and/or uniformity requirements contained in section 1903(w)(3)(B) and (C) of the Social Security Act.

and that

> The [4] classes of assessed services mentioned violate section 1903(w)(7) of the Social Security Act and section 42 CFR 433.56 of the implementing Federal Regulation.

The letters asked New York to submit waiver requests for the fifteen tax programs, and "information supporting the permissibility" of the four classes of assessed services.

6. Since January 1995, New York has submitted more than 1200 pages of waiver requests representing over 60 separate submissions for more than 20 different tax programs. HCFA has not acted on any of these applications, even though they have been pending for almost three years, and prior to the cancellation of section 4722(c) of the Balanced Budget Act ("BBA") on August 11, without any meaningful action or communication of any kind by HCFA to the State regarding either the State's health care provider taxes or the pending waiver applications. The failure of HCFA to act or communicate with the State about the waivers, together with the State's inability to confirm whether any state had received HCFA approval of its waivers, caused the State concern about what criteria HCFA was using in processing and evaluating health care provider tax waiver applications, and increased the State's uncertainty about when and under what

circumstances pending waivers would be approved by HCFA.

7. On June 16, 1997, State representatives, including the undersigned, met, at HCFA's invitation, with HCFA officials, including Charlene Brown, to discuss whether or not HCFA was prepared to act on the State's pending waivers. Ms. Brown informed us that HCFA was not prepared to take any administrative action or engage in rule-making at that time, and that any rule making designed to resolve issues with all the states would not be undertaken by HCFA in the foreseeable future. It became apparent as the meeting progressed that the State and HCFA entertained substantial differences in how we interpreted the requirements of the regulations relating to the waiver criteria. The meeting ended without resolving anything and New York intensified its efforts to obtain legislative relief, as HCFA had implied during the meting [*sic*] was the appropriate resolution. The State's effort resulted in section 4722(c) of the Balanced Budget Act of 1997 ("BBA").

8. HCFA's failure to act with respect to the State's taxing program, coupled with its continued inaction on the State's waiver applications and the consequent buildup of potential State liabilities, prompted the State to seek clarifying Federal legislation. The State's efforts led to enactment of the canceled provisions of section 4722(c), which deemed the State's health care provider taxes permissible, and prohibited HCFA from taking any disallowance related to health care provider tax collections for the period October 1, 1992, through May 31, 1997.

9. New York estimates that the total potential liability of FFP prior to the adoption of section 4722(c) for

these taxes was about $2.6 billion for the period October 1, 1992, through March 31, 1997. The enactment of section 4722(c) prohibited HCFA from disallowing any part of that amount.

10. Since the cancellation of section 4722(c) on August 11, 1997, New York has engaged in negotiations with Charlene Brown and other HCFA officials regarding its health care provider tax waivers which are now "formally pending" before HCFA once again. Notwithstanding the clarifying regulatory change that was made on October 15, 1997, HCFA has not granted any waivers relating to New York's health care provider taxes, although the State has been informed by HCFA that some of its waivers will be approved.[1]

11. The effect of the cancellation of section 4722(c) was to restore to HCFA the authority to take a disallowance related to New York's health care provider taxes, an authority which had been removed by enactment of that section. Following the issuance of the October 9, 1997, letter to State Medicaid Directors, meetings were held between the State and HCFA officials where HCFA stated that there would be no resolution of New York's waivers absent resolution of waivers for all states. HCFA has stated that they believe that such global resolution can not be effected without federal legislation. If HCFA now disallows FFP, as threatened in the October 9, 1997, State Medicaid Director' [*sic*] letter, New York State

[1] These waivers include those applicable to inpatient and outpatient assessments on hospitals to fund the SPARCS program and an assessment on Commercial Insurers, which has expired. The estimated value of these three waivers is approximately $30 million.

statute provides for how the impact of disallowance will be shared between the state, the localities and healthcare providers, all of whom will experience losses if such a disallowance is taken.

I declare under penalty of perjury that the foregoing is true and correct. Executed on November 25, 1997

/s/ SARAH VAN LEER
SARAH VAN LEER

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civ. No. 97-2393 (TFH)

CITY OF NEW YORK, ET AL.,
PLAINTIFFS

v.

WILLIAM J. CLINTON, ET AL.,
DEFENDANTS

Civ. No. 97-2399 (TFH)

NATIONAL TREASURY EMPLOYEES UNION,
ET AL., PLAINTIFFS

v.

UNITED STATES, ET AL.,
DEFENDANTS

Civ. No. 97-2463 (TFH)

SNAKE RIVER POTATO GROWERS, INC.,
ET AL., PLAINTIFFS

v.

ROBERT E. RUBIN, DEFENDANT

DECLARATION

I, MIKE CRANNEY, declare as follows:

1. I am a farmer with farms located in Cassia County, Idaho. My crops include potatoes, sugarbeets and grain.

2. I am a plaintiff in this case and a Director and Vice Chairman of Snake River Potato Growers, Inc., an Idaho agricultural cooperative organized in May of 1997, which is also a plaintiff in this case.

3. On or about July 1996 I attended a meeting of sugarbeet growers in Burley, Idaho, where I learned about certain cooperative tax legislation which had been introduced in the U.S. Congress that would allow certain farmers' cooperatives to acquire the stock of processor companies for cash from owners, who could defer paying tax on the gain on the sale.

4. I learned that Snake River Sugar Company, a sugarbeet farmers' cooperative, planned to take advantage of that legislation if it were passed to acquire the Amalgamated Sugar Company.

5. I joined Snake River Sugar Company as a member in the Fall of 1996.

6. I later learned that, because the legislation had not yet been passed, Snake River Sugar Company acquired the Amalgamated Sugar Company in a transaction with a different structure. I was informed that this alternative structure did allow the seller, in that instance, to defer paying tax on the gain, but with the disadvantages of the cooperative not being able to use the facilities as collateral and of additional expense through higher interest on an unsecured loan. That structure was also difficult and expensive to negotiate and document, and dependent on particular features of the Amalgamated Sugar

situation that would not be present in other purchase situations.

7. From time to time between January 1997, when the Snake River Sugar Company transaction was closed, and August of 1997, I was aware that efforts were still being made to obtain passage of the cooperative tax legislation.

8. In January of 1997, I learned that Ore-Ida Foods, a large potato processor in the state of Idaho, was considering selling one or more of its Idaho plants.

9. About the same time, Potato Growers of Idaho, a farmers' bargaining cooperative which bargains for price but does not acquire or process any potatoes, made the decision to sponsor the organization of a cooperative to handle processing and marketing activities for its members and other potato growers. I was then serving on the board of Potato Growers of Idaho and took steps in coordination with others to cause plaintiff, Snake River Potato Growers, to be organized in May of 1997. I was informed that Snake River Potato Growers was being organized and structured in such a way that it would be eligible to take advantage of the pending cooperative tax legislation.

10. One of the principal goals and objectives of Snake River Potato Growers was to acquire storage and processing facilities in order to enhance the marketing of potatoes of its members.

11. While Snake River Potato Growers was being organized, the organizers arranged for our legal counsel to make contact with Ore-Ida Foods to determine the availability of a plant for purchase by Snake River Potato Growers. On or about February 1997 information concerning the pending tax legislation

was furnished at the organizers' instruction to Ore-Ida Foods in order that they might understand the tax benefits of selling facilities to a cooperative.

12. Before our cooperative could be organized and funded, Ore-Ida Foods sold its Idaho facilities to McCains, a Canadian agribusiness company.

13. If they own and control storage and processing capacity, farmers are more able to avoid price swings and take advantage of favorable pricing through storing and marketing their crops at opportune times. Conversely, when processing firms combine, the farmer is left with fewer potential customers competing for his crops, and he is even more at their mercy with respect to prices.

14. There are ample processing facilities in the state of Idaho, making it preferable to acquire companies that own existing facilities rather than to build new ones. Many processing facilities were constructed many years ago and are typically still in the hands of original owners, many of whom will realize substantial capital gains upon the sale of their facilities.

15. One investor-owned processor company can acquire another investor-owned processor company tax-free through the exchange of stock. Agricultural cooperatives are not able to do such exchanges of stock because their stock cannot be held by anyone who is not a member of the cooperative.

16. In addition to myself, several members of Snake River Potato Growers who raise sugarbeets in rotation observed the expensive, complicated, and lengthy process of acquiring the sugar plants of Amalgamated under the structured transaction, be-

cause the cooperative tax legislation was not available. It was my understanding that Snake River Sugar Company had negotiated a lower price for the Amalgamated plants because of the tax deferral.

17. I am informed that the Cooperative Tax Act was enacted on August 5, 1997, and believed that the Cooperative Tax Act was enacted for the specific purpose of enabling cooperatives like Snake River Potato Growers to acquire processing facilities more easily because the sellers would be able to defer their taxes.

18. Snake River Potato Growers had concrete plans to utilize the cooperative tax legislation to acquire facilities.

19. On or about May 1997, I spoke with Howard Phillips, the principal owner of Idaho Potato Packers, concerning the possibility that, if the Cooperative Tax Act were passed, Snake River Potato Growers might purchase a Blackfoot, Idaho processing facility in a transaction that would allow the deferral of gain. Mr. Phillips expressed an interest in such a transaction if the Cooperative Tax Act were to pass. Mr. Phillips also acknowledged to me that Jim Chapman, our General Manager, had engaged him in a previous discussion concerning this matter.

20. During the last year, members of Snake River Potato Growers, including myself, sold potatoes to many processors with facilities in Idaho, including Idaho Potato Packers. It is my understanding that during the period Idaho Potato Packers and many other processing facilities in Idaho acquired more than 50% of their potatoes from members and farmers eligible to become members of Snake River Potato Growers.

21. My discussion with Phillips was based on the assumption that Congress would soon pass legislation allowing Phillips and other owners to defer the tax on the gain on the sale of the Idaho Potato Packers facility to Snake River Potato Growers. It is clear to me, as the owner of a farm and other property, that an owner of a major asset will generally want a higher price, and may be unwilling to sell at any price acceptable to a would-be buyer, if he cannot defer the tax on his capital gain. Although I am certainly not an expert on tax matters, I am well aware that (a) it is always better to pay taxes later rather than sooner; (b) the tax law often makes it advantageous for individuals to keep major assets until death rather than sell them; and (c) competing buyers, such as agribusiness corporations, that can offer tax-deferred stock for stock transactions, have a very big advantage over farmers' cooperatives in purchasing processor companies unless the farmers' cooperatives can also offer tax-deferred transaction.

22. It was my understanding that IPP could readily have placed the facility in a wholly owned subsidiary, which IPP would then sell to Snake River Potato Growers, leaving Snake River Potato Growers with 100% of the stock of the processor company, as required by the vetoed tax provision.

23. Congress did pass legislation—the Cooperative Tax Act at issue in this case-that would have allowed IPP and other owners to defer the tax on the gain on the sale of the Idaho Potato Packers facility to Snake River Potato Growers, but on August 11, 1997, President Clinton cancelled that legislation.

24. The President's cancellation of the Cooperative Tax Act caused me to terminate discussions with Phillips about the possibility of Snake River Potato Growers buying the Idaho Potato Packers facility. It was clear to me, for the reasons I have stated, that IPP Sellers and other owners would demand a higher price, and might be unwilling to sell at any acceptable price, without the tax deferral provided by the Cooperative Tax Act.

25. It is my understanding that, just before Congress adjourned in November 1997, legislation passed in the House that would have allowed sellers of processing company stock to defer paying tax on the gain realized in a sale to an eligible farmers' cooperative, but that this measure never passed the Senate. Although this legislation was in some ways similar to the Cooperative Tax Act vetoed by the President in August, it was considerably more narrow and would have made it significantly more difficult for Snake River Potato Growers to acquire, at tax deferred prices, processing facilities in general and the IPP facility in particular. Among other things, Snake River Potato Growers could not have purchased stock of many facilities, including the IPP facility, on a tax-deferred basis for several years because those facilities would not have acquired more than 50% of their potatoes from Snake River Potato Growers (and its members) for three of the five years before the sale, as would have been required under the new legislation. The vetoed tax provision, in comparison, only required that this 50% requirement be met for the one year prior to the sale.

26. Snake River Potato Growers still wishes to buy processing facilities. I believe that IPP remains

interested in selling the IPP facility if a sale can be completed on a tax-deferred basis. Snake River Potato Growers is also actively working on identifying other processing facilities for possible future purchase if the President's cancellation of the Cooperative Tax Act is reversed.

27. The matters set forth in this declaration are based on my personal knowledge, and, if called as a witness, I could and would testify competently thereto.

I declare under penalty of perjury under the laws of the United States that the foregoing is true and correct to the best of my knowledge. Executed on November 24, 1997.

/s/ MIKE CRANNEY
MIKE CRANNEY

CONGRESS OF THE UNITED STATES
HOUSE OF REPRESENTATIVES
WASHINGTON, DC 20615

December 1, 1995

Dear Colleague:

We urge you to cosponsor H.R. 2676, legislation introduced last week to provide American farmers a more firm economic footing and more control over their economic destiny. We believe this proposal will help farmers, through their cooperatives, purchase facilities to refine and process their raw commodities into value-added products.

As U.S. farmers prepare for 21st century agriculture, it is important that we consider options to help our farmers respond to these challenging times. Our bipartisan legislation does just that.

In agriculture as a whole, refining and processing of commodities represent an ever increasing share of total profit. It was not too long ago that farm commodities represented about 40 percent of the cost of the final product purchased by the consumer. Today, however, this percentage on average has decreased to under 25 percent and continues to decline. It is important that American farmers increase their ownership stake in processing and refining to succeed in an increasingly competitive market.

H.R. 2676 is simple and straightforward. It allows the sale of processing and refining facilities to a farmers' cooperative and defer the gain as long as the proceeds from the sale is reinvested. To qualify,

the sale must be made to a farmer owned-and-controlled cooperative whose members produce a majority of the agricultural products that are refined or processed by the facility being purchased.

This provision is similar to treatment available to the owners of businesses that sell to Employee Stock Ownership Plans (ESOPs) and employee-owned coops. H.R. 2676 amends section 1042 of the Internal Revenue Code to give a similar incentive for sales to qualifying farmers' coops. It is tightly drafted to avoid abuse while still accomplishing the goal of giving farmers more control over some of the most profitable activities of agricultural production. It is also similar to numerous other provisions in the tax code that allow for the deferral of gain on many types of transactions.

This change is long overdue. It will encourage farmers to help themselves in a more market-oriented environment by vertically integrating. If this legislation is passed, we are confident that, 10 years from now, we will look on this bill as one of the most beneficial actions Congress took for U.S. farmers.

If you want to join us in cosponsoring this important initiative, please call Dave Ebersole at 53?42 or Jasper Hamilton at ?6605.

Sincerely,

/s/ PAT ROBERTS
PAT ROBERTS

/s/ CHARLIE STENHOLM
CHARLIE STENHOLM

FOR IMMEDIATE RELEASE
CONTACT: McCALL CAMERON
MAY 30, 1997
202/226-8052

HULSHOF INTRODUCES
FARMER-FRIENDLY LEGISLATION

Joined by agriculture producers and farm cooperative organizations, U.S. Representative Kenny C. Hulshof (R-MO) today announced the introduction of a bill designed to give tax incentives that will give a competitive edge to farm cooperatives for the purchase of processing facilities.

The Agriculture for the 21st Century Act (HR 1752) will allow owners of agriculture refining and processing facilities—such as facilities that process corn, soybeans, and livestock—to defer taxes paid if they sell to a farm cooperative. The sellers of these processing facilities would be required to reinvest the capital gains from the sale in order to qualify for tax deferment.

"This legislation means farmers and farmer-owned cooperative organizations can more readily participate in the risks and rewards of food processing," Hulshof said. "A corn farmer will not only benefit from the sale of the corn at the grain elevator, but will also be able to share in the proceeds of the sale of cereal. Similarly, a soybean producer can potentially profit from the sale of cooking oil, rather than just on the sale of the soy beans."

"HR 1752 will also increase our international competitiveness and potentially lower consumer costs because it creates better efficiencies in food production and allow farmers through their farm cooperatives to be vertically integrated in the production of value-added products," Hulshof added.

"This is truly a winning situation for everyone that will help farmers make the transition to the market-based agriculture economy of the 21st Century," Hulshof stated.

HR 1752 enjoys bipartisan support. Among others, Representative Bob Smith (R-OR), Chairman of the House Agriculture Committee, Representative Charlie Stenholm (D-TX), the senior Democrat on the Agriculture Committee, and Representative Jo Ann Emerson (R-MO), have all added their names as original cosponsors. HR 1752 also has the strong support of, among others, the American Farm Bureau Federation, the Missouri Farm Bureau, Missouri Corn Growers, Missouri Soybean Association, the National Council of Farm Cooperatives, and MFA.

Bill Summary & Status for the 105th Congress

Item 1 of 1

PREVIOUS BILL:ALL | NEXT BILL:ALL
NEW SEARCH | HOME | HELP

H.R.1752

SPONSOR: *Rep Hulshof*, (introduced 05/27/97)

RELATED BILLS: *S.872*

TITLE(S):

* OFFICIAL TITLE AS INTRODUCED:

A bill to amend to Internal Revenue Code of 1986 to provide for the nonrecognition of gain on sale of stock to certain farmers' cooperatives.

STATUS: Floor Actions

*****NONE*****

STATUS: Detailed Legislative History

House Actions

May 27, 97:

Referred to the House Committee on Ways and Means.

Aug 5, 97:

See H.R. 2014.

STATUS: Congressional Record Page Reference

*****NONE*****

COMMITTEE(S):

* COMMITTEE(S) OF REFERRAL:

House Ways and Means

AMENDMENTS(S):

NONE

14 COSPONSORS:

Rep Stenholm - 05/27/97
Rep Crapo - 05/27/97
Rep Smith, R - 05/27/97
Rep English - 05/27/97
Rep Barrett, B - 05/27/97
Rep Emerson - 05/27/97
Rep Herger - 05/27/97
Rep Thurman - 05/27/97
Rep Combest - 05/27/97
Rep Minge - 05/27/97
Rep Sensenbrenner - 05/27/97
Rep Canady - 05/27/97
Rep LaHood - 05/27/97
Rep Ewing - 05/27/97

SUMMARY:

(AS INTRODUCED)

Amends the Internal Revenue Code to provide for the nonrecognition of gain on sales of stock of a qualified refiner or processor to an eligible farmer's cooperative.

Remarks on Line Item Vetoes of the Balanced Budget Act of 1997 and the Taxpayer Relief Act of 1997 and an Exchange With Reporters

August 11, 1997

The President. Last week we took historic action to put America's economic house in order when I signed into law the first balanced budget in a generation, one that honors our values, invests in our people, prepares our Nation for the 21st century.

It includes the largest increase in college aid since the GI bill, the largest increase in children's health since the creation of Medicaid over 30 years ago, tax cuts that are the equivalent of a $1,000 raise in take-home pay for the average family with two children, and much more that is good for America.

The new balanced budget law also offers the first opportunity to use a powerful new tool to protect taxpayers: the line item veto, a tool designed to fight against waste and unjustifiable expenditures, to ensure Government works for public interests, not the private interest.

In the past, good legislation could be cluttered up with unjustifiable or wasteful spending or tax provisions, leaving the President no choice but to sign or veto the overall legislation. With the line item veto, the President can sign an overall bill into law that cancel a particular spending project or a particular tax break that benefits only a handful of individuals or companies.

Forty-three Governors throughout our Nation already have the line item veto power. Last year I signed the Federal line item veto into law. Last

month the United States Supreme Court, on procedural grounds, rejected a challenge to this authority. Today, for the first time in the history of our country, the President will use the line item veto to protect taxpayers and to ensure that national interests prevail over narrow interests.

In reaching agreement with Congress on how to balance the budget, we worked very hard to be fair to all Americans and to avoid wasting our citizens' tax dollars. For the same reason, I've asked the members of my administration to work carefully over the final legislation to identify any specific spending or tax provisions that I should consider canceling. Here's what I told the budget team.

First, any provision I cancel must be one that was not included-and let me emphasize-not included-as a part of the balanced budget agreement process with Congress. Our agreement was entered into in good faith, and I will keep it. Second, any provision I cancel must be one that benefits just a few individuals, corporations, or States at the expense of the general interest. Finally, any provision I cancel must be one that is inconsistent with good public policy. Just because something benefits a small number of people doesn't necessarily mean that it hurts the public interest or the American people at large.

After careful scrutiny and numerous meetings with my staff and Cabinet members, we have found three provisions that meet those criteria. In a few moments I will use the power of the line item veto to cancel a provision that would allow financial service companies to shelter income in foreign tax havens to avoid all U.S. taxation. I will also cancel a provision that singles out New York by allowing it to tap into the Federal Treasury to reduce its State

expenditures through the use of health provider tax to match Federal Medicaid dollars that are impermissible in every other State in the country and actually in existence now in several other States. No other State in the Nation would be given this provision, and it is unfair to the rest of our Nation's taxpayers to ask them to subsidize it. Finally, I will cancel a provision that, though well-intended, is poorly designed. This provision would have allowed a very limited number of agribusinesses to avoid paying capital gains taxes, possibly forever, on the sales of certain assets to farmers' cooperatives. And it could have benefited not only traditional farm co-ops but giant organizations which do not need and should not trigger the law's benefits.

Because I strongly support family farmers, farm cooperatives, and the acquisition of production facilities by co-ops, this was a very difficult decision for me. And I intend to work with Congressman Stenholm and Hulshof and Senators Daschle, Dorgan, and Conrad and other interested Members of the Congress to redesign this effort so that it is better targeted and not susceptible to abuse.

The actions I take today will save the American people hundreds of millions of dollars over the next 10 years and send a signal that the Washington rules have changed for good and for the good of the American people. From now on, Presidents will be able to say no to wasteful spending or tax loopholes, even as they say yes to vital legislation. Special interests will not be able to play the old game of slipping a provision into a massive bill in the hope that no one will notice. For the first time, the President is exercising the power to prevent that from happening. The first balanced budget in a generation is now also the

first budget in American history to be strengthened by the line item veto. And that will strengthen our country.

And now I want to go and sign these provisions.

[The President signed the cancellation letters.]

Q. Mr. President, is that the only pork you can find in that budget?

The President. I think that my staff is going to brief you abut it, but let me say that they have—the relevant Cabinet and staff members have gone over this quite extensively. Keep in mind, the primary use of the line item veto overwhelmingly was meant to be in the appropriations process, which is not even started yet. I don't have the first appropriations bill.

There are only a few spending items in this balanced budget that are part of the so-called entitlement process, so that—for example, you had the New York Medicaid provision there on provider taxes. With regard to the taxes, there were some 79 items certified to me, but that was only because of their size, that is, the number of people affected by it. Of those 79, 30, or more were actually recommendations by the Treasury Department to fix flaws in the present laws or to ease the transition in the tax laws. And another dozen or more were put in by Congress by agreement with the Treasury Department to fix procedural problems in the law. Then there were a number of others that I agreed were good policy. So these are the ones that I think—and then there were several others that I might have line-item-vetoed, but they were plainly part of the understandings reached with Congress as a part of the budget process. So these seemed to me to be the ones, after being briefed by my staff, that both involved significant amounts of money

and met the three criteria that I mentioned. And I believed it was the appropriate thing to do.

Q. May I ask another way, sir, the last question another way? Were these the most glaring examples of why you were given this power and, therefore, they might hold up better in a court challenge.

The President. Well, I wouldn't say that. I expect the most glaring examples to come up in the appropriations process, at least if the past is any prologue. Now, it may be that the use of the line item veto here will mean that it won't have to be used as much in the appropriations process, and that would please me greatly. But I think it's important that the American people understand that when the line item veto was given to the President, the primary assumption was that it would take out special projects that were typically funded in big bills, and those are those big appropriations bills, none of which have come to me yet.

But I do believe that this should withstand court challenge because the process by which the matters were reviewed at least was very careful, exhaustive process, and I received input from people all over the country that had interests in it, through my Cabinet and staff members. But we worked very hard on this, and—well, since I told you after my press conference on Thursday that I would be meeting with my staff, and I had meetings and conversations each day since then before finally making the decisions.

Clair [Clair Shipman, CNN].

Q. Mr. President, it sounds as though, given the deliberations among your staff and the talk about the court challenges and the difficulty finding items in this particular tax and spending legislation, that

you decided to act now largely for symbolic reasons instead of—

The President. No, I wouldn't say that. I think these three things are appropriate. But I just want to point out that I think that when the Congress certified, for example, 79 tax items to me, people said, "Well, maybe you ought to veto 76 of them." And I think it's important to recognize that there really never were 79 candidates for line item veto there. The Congress is required—the Joint Tax Committee is required by law to certify to the President all the tax items that benefit fewer than 100 people, and there were—the vast majority of those were either put in by the Treasury Department to actually clean up procedural problems in the law so that the numbers were smaller.

Then there were a number of things that, as I said. I might well have line-item-vetoed, but they were part of the overall budget process and that did a lot of good for the American people and I have to honor the agreements that were made and the process of it.

So these things I hope will be both real and symbolic in the sense that I'm hopeful that this will work out pretty much the way it did when I was Governor: that is, when you know the President is prepared to use the line item veto, that tends to operate as a deterrent against the most egregious kinds of projects that would otherwise not be funded. So it would suit me if, after a while, the use of the veto became quite rare because there was a disciplined agreement not to have projects that ought not be funded in the first place.

Q. Sir, can you tell me where in the Constitution the President is given this kind of power that hasn't been exerted until now?

The President. Well, the power is given by legislation. The real question is, does the Constitution permit or forbid the Congress to give the President this kind of power. I believe that since—if you look at the fact that 43 States have this power for the Governor, and it has been upheld in State after State after State, the provisions of most State constitutions are similar to the provisions of the Federal Constitution in the general allocation of executive authority and legislative authority.

So I think it is an implicit thing. As long as the legislature has the right to override the executive, then for the legislature to allow the executive to make reasoned judgements abut particular items in these omnibus bills, I do not believe is an unconstitutional delegation of the legislature's authority to the President.

So keep in mind, they can override this. If they decide that they think I'm wrong, and two-thirds of them agree, they can override this.

Q. Do you welcome a challenge?

Q. Mr. President, Senator McCain sent you a note last week saying you ought to consider putting off a line item veto until you get the appropriations bills, on the grounds that it might be a blow to the spirit of cooperation that produced the tax cut and the balanced budget bills in the first place. Did you give that any consideration?

The President. Absolutely. And when Senator McCain came to see me about the campaign finance issue and our common support for his legislation, we talked about it a little bit. As I've already said to you, that one of the reasons that we have decided on a relatively small number is I didn't want to touch anything that I thought where there was even

a question that it might have been part of the negotiating process and a cooperative spirit with Congress.

If you look at these three things, they present three entirely different problems, but I think all three are outside the scope of the budget negotiating process and all three are kinds of things that line item veto was meant for: the first, the avoidance of Federal taxation in an inappropriate way; the second, giving a break to one State in a way that would immediately disadvantage several others and potentially disadvantage all the other States; and the third, as I said, I believe a very worthy goal, having incentives for farmers' co-ops to integrate with production facilities in a way that is overbroad and could lead to the total avoidance of taxation under circumstances, which are inappropriate, which would require a more disciplined fix. I think those are the kinds of things that the line item veto was meant to deal with these contexts.

Now, when you get to the appropriations process it will be somewhat more straightforward: Should this project be built or not; should this road be built or not; should this money be given to this agency or not for this program? And I think that those are the things where typically it's in use at the State level. But in the context of taxes and the entitlement, I thought each of these three things presented a representative case where the veto was intended to be used.

Q. Are you running out of travel money, sir? [*Laughter*]

The President. I hope not; I'm trying to go on holiday. [*Laughter*]

Note: The President spoke at 12:30 p.m. in the Oval Office at the White House. The President signed cancellations affecting Public Law 105-33.

No. 97-1374

Supreme Court, U.S.
FILED
APR 3 1998
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1997

WILLIAM J. CLINTON, *et al.*,
Appellants,

v.

CITY OF NEW YORK, *et al.*,
Appellees.

ROBERT E. RUBIN,
Appellant,

v.

SNAKE RIVER POTATO GROWERS, INC., *et al.*,
Appellees.

On Appeal from the United States District Court for the District of Columbia

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BRIEF OF APPELLEES SNAKE RIVER POTATO GROWERS, INC. AND MIKE CRANNEY

DONALD B. HOLBROOK
RANDON W. WILSON
WILLIAM H. ORTON
ANDREW H. STONE
JONES, WALDO, HOLBROOK & McDONOUGH
170 South Main Street
Salt Lake, UT 84101
(801) 534-7283

LLOYD N. CUTLER
LOUIS R. COHEN
Counsel of Record
LAWRENCE A. KASTEN
JONATHAN J. FRANKEL
PAUL R. ECKERT
MATTHEW A. BRILL
WILMER, CUTLER & PICKERING
2445 M Street, N.W.
Washington, D.C. 20037
(202) 663-6000

April 1998

BEST AVAILABLE COPY

QUESTIONS PRESENTED

1. Whether appellees Snake River Potato Growers, Inc. and Mike Cranney have Article III standing.

2. Whether the Line Item Veto Act of 1996 violates Article I of the Constitution or principles of separation of powers.

RULE 29.6 LISTING

Appellee Snake River Potato Growers, Inc. is a non-profit agricultural cooperative association incorporated under the laws of Idaho. It has no parent companies or subsidiaries.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1997

No. 97-1374

WILLIAM J. CLINTON, *et al.*,
Appellants,
v.
CITY OF NEW YORK, *et al.*,
Appellees.

ROBERT E. RUBIN,
Appellant,
v.
SNAKE RIVER POTATO GROWERS, INC., *et al.*,
Appellees.

On Appeal from the United States District Court for the District of Columbia

BRIEF OF APPELLEES SNAKE RIVER POTATO GROWERS, INC. AND MIKE CRANNEY

OPINION BELOW

The opinion of the district court is now reported at 985 F. Supp. 168.

JURISDICTION

The district court had jurisdiction under 2 U.S.C. § 692(a) and 28 U.S.C. § 1331. The order of the district court was entered on February 12, 1998. A notice of appeal was filed on February 13, 1998. J.S. App. 34a-35a. This Court noted probable jurisdiction on February

27, 1998. This Court has jurisdiction under 2 U.S.C. § 692(b).[1]

STATEMENT

Article I of the Constitution prescribes a "single, finely wrought and exhaustively considered, procedure" for enacting, amending, and repealing federal laws. *INS v. Chadha*, 462 U.S. 919, 951 (1983). The heart of that procedure is the requirement that both houses of Congress pass, in the same final form, every bill that adds, amends, or repeals any provision of any federal statute. Each bill so passed must be presented to the President, whose choices are limited to approving it in whole, returning it in whole, or taking no action.

The Line Item Veto Act of 1996, 2 U.S.C. §§ 691 *et seq.* (Supp. II 1996) ("LIV Act" or "Act"), departs from this procedure by authorizing the President alone to "cancel" provisions of certain bills in conjunction with their enactment. Whether this is viewed as a power to produce truncated laws never passed by either House or as a unilateral power to repeal duly enacted provisions of law, it is a power that Article I does not permit the President to have.

This case was brought by a farmers' cooperative and an individual member and officer of the cooperative. They

[1] Appellants argue, for the first time in their merits brief in this Court, that some appellees do not have statutory standing under 2 U.S.C. § 692, the special judicial review provision of the Line Item Veto Act, because they are not "individuals." Appellants do not state what bearing they think this has on the statutory jurisdiction of either the district court or this Court. As to the district court, first, plaintiff Mike Cranney, one of the *Snake River* appellees, is an "individual" statutorily authorized to proceed under 2 U.S.C. § 692(a)(1); second, the *Snake River* appellees pleaded, and the district court plainly had, jurisdiction under 28 U.S.C. § 1331 as well as 2 U.S.C. § 692(a)(1), so the district court's decision is incontestably valid and ripe for review. As to whether that review properly lies in this Court, the Court has jurisdiction under 2 U.S.C. § 692(b) to review "any order of [the district court] . . . issued pursuant to an action brought under [2 U.S.C. § 692(a)(1)]." The district court's order granting summary judgment for plaintiffs is such an order in such an action.

suffered economic injury when the President, acting under the purported authority of the Act, canceled Section 968 of the Taxpayer Relief Act of 1997, Pub. L. No. 105-34, 111 Stat. 788 ("TRA"), which added a new section (Section 1042(g)) to the Internal Revenue Code that was specifically designed to benefit farmers by helping farmers' cooperatives purchase agricultural refining or processing companies.

A. The Line Item Veto Act

The full title of the Act is "An Act to give the President line item veto authority with respect to appropriations, new direct spending, and limited tax benefits." H.R. Conf. Rep. No. 104-491, at 14 (1996). It states that the President may "cancel in whole" any (1) "dollar amount of discretionary budget authority," (2) "item of new direct spending," or (3) "limited tax benefit" by sending Congress a "special message" within five days after signing a bill containing the item. 2 U.S.C. § 691(a). The President may cancel an item whenever he determines that "such cancellation will (i) reduce the Federal budget deficit; (ii) not impair any essential Government functions; and (iii) not harm the national interest . . . ." *Id.* § 691(a)(A). No more specific or substantive determination is required.

The Act defines "dollar amount of discretionary budget authority" as any whole dollar amount of appropriation either set forth in the text of the law or found in (or determinable from) the tables, charts, or explanatory text of statements or committee reports accompanying a bill. *Id.* § 691e(7). Items of new "direct spending" are (a) budget authority provided by law (other than an appropriation law); (b) entitlement authority; and (c) the food stamp program." *Id.* § 691e(5). "Limited tax benefits" include any revenue-losing provision that gives tax relief to 100 or fewer persons in any fiscal year or grants "temporary or permanent transitional relief" from a change in

the Internal Revenue Code to ten or fewer persons. *Id.* § 691e(9)(A).[2]

The Act defines "cancel" as to "prevent . . . from having legal force or effect" (with respect to limited tax benefits or items of new direct spending) and to "rescind" (with respect to any amount of budgetary authority). *Id.* § 691e(4). The term "cancel" and its definition were designed to make clear that the President's action would be permanent and irreversible. The Act's Conference Report explains that "[t]he term 'cancel' was specifically chosen, and is carefully defined . . . . The conferees intend that the President may use the cancellation authority to surgically *terminate* federal budget obligations." H.R. Conf. Rep. No. 104-491, at 20 (emphasis added). For tax benefits, cancellation requires "collect[ion of] tax that would otherwise not be collected or den[ial of] the credit that would otherwise be provided." *Id.* at 29. The Act provides for expedited congressional consideration of "disapproval bills," which, if enacted into law, restore a canceled item in the same form in which it was originally presented to the President, 2 U.S.C. §§ 691d, 691e(6). But a disapproval bill is a new law that must be passed by both Houses and presented to the President in the

[2] The responsibility for identifying "limited tax benefits" lies in the first instance with the Joint Congressional Committee on Taxation. Whenever a bill would amend the Internal Revenue Code, the Joint Committee must prepare a statement either (1) certifying that the bill contains no limited tax benefits, or (2) listing all such items. 2 U.S.C. § 691f. Congress then decides whether to include this information in the bill itself. *Id.* § 691f(b)(1). If Congress includes in the bill the Joint Committee's list of limited tax benefits, the President may cancel only items on the list. *Id.* § 691f(c)(1). If Congress includes in the bill a Joint Committee determination that the bill does not contain any limited tax benefits, the President is bound by that determination. *Id.* If Congress elects not to include in the bill the information contained in the Joint Committee's statement, the President may cancel any item he finds meeting the definition of limited tax benefit. *Id.* § 691f(c)(2).

manner prescribed by Art. I, § 7, cl. 2 of the Constitution.

B. Section 968 of the Taxpayer Relief Act

1. Beginning in 1995, Congress considered a series of bills to help farmers "forward integrate" into processing their crops. *See* H.R. 2676, 104th Cong. (1995); S. 1481, 104th Cong. (1995); H.R. 1752, 105th Cong. (1997); S. 872, 105th Cong. (1997). The mechanism of each bill was to amend the Internal Revenue Code to permit owners of agricultural refining or processing companies to defer paying tax on any capital gain if they sell their companies to "eligible farmers' cooperatives."

The purpose of these bills was to help farmers. When Representatives Roberts and Stenholm introduced H.R. 2676 on November 20, 1995, they told their colleagues that it would "encourage farmers to help themselves in a more market-oriented environment by vertically integrating. If this legislation is passed, we are confident that, 10 years from now, we will look on this bill as one of the most beneficial actions Congress took for U.S. farmers." J.A. 117 (*Letter from Congressmen Pat Roberts and Charlie Stenholm* (Dec. 1, 1995)).[3] Introducing the Senate version of the same bill, S. 1481, Senator Hatch said it "would provide farmers who form farmers cooperatives the opportunity for an ownership interest in the processing and marketing of their products." 141 Cong. Rec. S18739 (daily ed. Dec. 15, 1995). Senator Craig, another of S. 1481's sponsors, said it "would be helpful to farmers cooperatives," noting that "[c]urrently,

[3] *See also* J.A. 116-17 ("We urge you to cosponsor H.R. 2676, legislation introduced last week to provide American farmers a more firm economic footing and more control over their economic destiny. We believe this proposal will help farmers, through their cooperatives, purchase facilities to refine and process their raw commodities into value-added products. . . . H.R. 2676 . . . is tightly drafted to avoid abuse while still accomplishing the goal of giving farmers more control over some of the most profitable activities of agricultural production.").

farmers cannot compete with other business entities . . . in buying such [processing] businesses because of the advantages inherent in the tax deferrals available in transactions with these other purchasers."[4] *Id.*

On May 27, 1997, Representative Hulshof introduced a very similar new bill in the House, H.R. 1752, *supra*, and on June 10, 1997, Senator Roberts introduced an identical measure in the Senate, S. 872, *supra*. These bills were again designed to help farmers "more readily participate in the risks and rewards of food processing." J.A. 118 (Press Release, *Hulshof Introduces Farmer-Friendly Legislation* (May 30, 1997)).[5]

In June 1997, a section virtually identical to the Hulshof and Roberts bills was included in the House's version of the TRA. *See* H.R. 2014, 105th Cong. (1997); Joint Committee on Taxation, *Description of Chairman's Mark Relating to Revenue Reconciliation Provisions* 108 (June 9, 1997) (Record at Docket Entry 14 (*see* J.A. 8), App. Tab 12). The Committee Report on the House bill explains that, "[t]he Committee believes it appropriate to facilitate the transfer of refiners and processors to farmers' cooperatives." H.R. Rep. No. 105-148, at 420 (1997). The provision was accepted by the conference with minor modifications, *see* H.R. Conf. Rep. No. 105-220, at 479 (1997), and was enacted into law as

[4] Senator Craig appears to have been referring to the fact that an ordinary business corporation can acquire a food processing or refining company in a merger or stock-for-stock transaction in which no gain is recognized to the seller. *See* 26 U.S.C. §§ 354(a), 368(a), 1032. A farmers' cooperative, although a corporation, cannot engage in such a transaction because its stock may be held only by its farmer members. *See* 26 U.S.C. § 521(b)(2).

[5] Representative Hulshof said of the bill, "[a] corn farmer will not only benefit from the sale of the corn at the grain elevator, but will also be able to share in the proceeds of the sale of cereal. Similarly, a soybean producer can potentially profit from the sale of cooking oil, rather than just on the sale of the soy beans." J.A. 118 (internal quotations omitted).

Section 968 of the TRA, Pub. L. No. 105-34, 111 Stat. 788, 895-96.

2. Section 968 amended section 1042 of the Internal Revenue Code, 26 U.S.C. § 1042, an existing provision that permits nonrecognition of gain on sales of certain securities to employee stock ownership plans if the proceeds of the sale are invested in "qualified replacement property."[6] Specifically, Section 968 added a new subsection, 26 U.S.C. § 1042(g) (canceled) (J.S. App. 73a-74a), which provided for nonrecognition of gain on sales of stock of "qualified refiner[s] or processor[s]" to "eligible farmers' cooperative[s]." *Id.* § 1042(g)(1), (2). Eligible farmers' cooperatives are defined as associations of farmers and growers "engaged in the marketing of agricultural or horticultural products," organized in cooperative form to return to their members the proceeds of the sale of such products. *See id.* § 1042(g)(3).[7] Qualified refiners or processors are (1) domestic corporations, "substantially all of the activities of which consist of the active conduct of the trade or business or refining or processing agricultural or horticultural products," that (2) during the year prior to sale bought more than one-half of their produce from the purchasing cooperative or the farmers who make up the purchasing cooperative. *Id.* § 1042(g)(2).

3. The Joint Committee identified 79 provisions of the TRA, including Section 968, as "limited tax benefits." *See*

[6] 26 U.S.C. § 1042(a)(2), (c)(4). In general, qualified replacement property is any security issued by a domestic corporation, other than the corporation that issued the securities being replaced, that did not have excess "passive income" in the preceding taxable year.

[7] Section 1042(g)(3) defines "eligible farmers' cooperative" by reference to the general Internal Revenue Code provisions relating to cooperatives (26 U.S.C. §§ 1381-83), which in turn incorporate the definition of "farmers' cooperative" found at Section 521 of the Code (26 U.S.C. § 521).

H.R. Conf. Rep. No. 105-220, at 771-75. Pursuant to section 691f(b)(2) of the LIV Act, Congress included the Joint Committee's list in the TRA as a separate section. *See* Pub. L. No. 105-34 § 1701, 111 Stat. 1099-1103. President Clinton signed the TRA on August 5, 1997. On August 11, 1997, he sent a special message to Congress canceling two items in the TRA, one of which was Section 968. J.S. App. 66a-67a, 70a-71a.

In his special message, the President acknowledged that the purpose of Section 968 was to "encourage value-added farming through the purchase by farmers' cooperatives of refiners or processors of agricultural goods." J.S. App. 71a. And the President stated again, in remarks to the press about the cancellation later that same day, that farmers were the intended beneficiaries of Section 968 and those affected by its cancellation: "Because I strongly support family farmers, farm cooperatives, and the acquisition of production facilities by co-ops, this was a very difficult decision for me." J.A. 125 (33 Weekly Comp. Pres. Doc. 1225, 1226 (Aug. 11, 1997)).[8] The President said he was nevertheless canceling Section 968 because he thought it created "opportunities for complete avoidance of tax" and "failed to target its benefits to small-and-medium-size cooperatives." J.S. App. 71a.

C. Snake River, Cranney, and Their Efforts To Acquire Processing Facilities

In the district court, the *Snake River* appellees submitted a declaration of appellee Cranney ("Cranney Dec.") to demonstrate, and place into context, the concrete injury they sustained as a result of the removal of

[8] Appellant Rubin agreed: "[L]et me tell you, in our analysis . . . [w]e focused on exactly what the President has said, which was, what effect would this have on farmers and on co-ops and on processors . . . ." *Transcript of Press Briefing by Treasury Secretary Bob Rubin, OMB Director Frank Raines, Director, National Economic Council Gene Sperling*, at 6 (White House Aug. 11, 1997) (Record at Docket Entry 14 (*see* J.A. 8), App. Tab 19).

Section 1042(g) from the Internal Revenue Code. J.A. 108-115. Appellants did not submit any evidence in response to appellee Cranney's declaration.

As described in that declaration, Snake River was organized in May 1997. Its principal purpose was to serve as a vehicle for its Idaho potato farmer members to acquire and control processing facilities so they could store and market their potatoes. J.A. 110 (Cranney Dec. ¶¶ 9, 10). Snake River expected that this ownership and control would help farmers not only to share the proceeds of processing but also to combat price swings by timing sales to take advantage of market conditions. J.A. 111 (Cranney Dec. ¶ 13).

Members of Snake River had relevant immediately prior experience with such acquisitions. Cranney and other members of Snake River also grow sugar beets. In July 1996, they attended a meeting in Burley, Idaho of a different cooperative, Snake River Sugar Company, to discuss acquisition of sugar beet processing facilities. At the meeting, they learned of then-pending legislation, H.R. 2676, *supra*, to allow owners of processing companies to sell them to farmers' cooperatives without recognition of gain. *See* J.A. 109 (Cranney Dec. ¶¶ 3, 4). Throughout the fall of 1996, Snake River Sugar Company (in which Cranney had become a member) attempted to negotiate the purchase of a processing facility owned by Amalgamated Sugar Company. J.A. 109-10 (Cranney Dec. ¶¶ 5-6). The negotiations were premised on the parties' expectation that H.R. 2676 would be enacted. J.A. 109, 111-12 (Cranney Dec. ¶¶ 3, 4, 16). In January 1997, at a point when this tax legislation appeared dormant, Snake River Sugar Company purchased Amalgamated's processing facilities anyway, but in a more expensive transaction. J.A. 109-10 (Cranney Dec. ¶ 6). Amalgamated, the seller, continued to insist on nonrecognition of gain. This proved achievable, but only in a more complex transaction structure that did not allow use of the purchased

facilities as collateral for the purchase loan (so that the cooperative needed to take out a more expensive unsecured loan) and had large legal and accounting costs. *Id.* Cranney believes the structure used in the sugar purchase would be impossible for generally less prosperous potato farmers. *See* J.A. 109-10, 111-12 (Cranney Dec. ¶¶ 6, 16).

When the President canceled Section 968, appellees were actively engaged in the acquisition process. In January 1997, Potato Growers of Idaho, a bargaining cooperative for Idaho potato growers whose membership included appellee Cranney, learned that Ore-Ida Foods, a large potato processing company, was interested in selling one or more of its Idaho potato processing facilities. J.A. 110 (Cranney Dec. ¶ 8). In February, representatives of Potato Growers of Idaho briefed Ore-Ida on the status of the legislative effort and on how the tax legislation would give Ore-Ida a financial incentive to sell to the cooperative. J.A. 110-11 (Cranney Dec. ¶ 11). Before a transaction could be negotiated, however, Ore-Ida sold its Idaho facilities to McCain Foods Limited, a Canadian agribusiness company. J.A. 111 (Cranney Dec. ¶ 12); *see also* Jodi Rave, *Ore-Ida Sale May Cost 900 Jobs,* Idaho Statesman, 1997 WL 5428739 (Mar. 15, 1997).

Beginning in February 1997, members of the potato bargaining cooperative, Potato Growers of Idaho, began planning to organize appellee Snake River as a new cooperative for the purpose of purchasing processing facilities. J.A. 110 (Cranney Dec. ¶¶ 9, 10). They were aware as they did so of efforts in Congress to reintroduce the tax legislation. *Id.* Snake River was incorporated in May 1997. Cranney became its vice chairman. J.A. 109 (Cranney Dec. ¶ 2).

Appellees started immediately on their first effort to acquire a facility with the help of the anticipated tax legislation. Cranney and Jim Chapman, General Manager of Snake River, met with Howard Phillips, a principal

owner of Idaho Potato Packers (IPP), a potato processing facility in Blackfoot, Idaho, to discuss the possible sale of an IPP facility to Snake River. J.A. 112 (Cranney Dec. ¶ 19). The discussion at these meetings assumed the enactment, in the near future, of cooperative tax legislation that would permit the sellers of the IPP facility to defer recognition of capital gain. J.A. 113 (Cranney Dec. ¶ 21). Cranney was advised that a deal for the IPP facility could be structured so as to comply with the requirements of anticipated Section 968. J.A. 112-13 (Cranney Dec. ¶¶ 20, 22). Phillips expressed his interest in such a sale should the nonrecognition provision become law. J.A. 112 (Cranney Dec. ¶ 19). The introduction of cooperative tax legislation in Congress in May and June 1997 further encouraged ongoing talks with Phillips. *See* J.A. (Cranney Dec. ¶ 23).

On August 11, 1997, when the President canceled Section 968 of the TRA, talks with Phillips terminated. J.A. 114 (Cranney Dec. ¶ 24). Snake River concluded that further discussions would be futile unless the cancellation of Section 968 was reversed. J.A. 113-14 (Cranney Dec. ¶¶ 21, 24, 25). The members of Snake River will be prepared to resume negotiations with Phillips and IPP, and will identify other processing facilities for possible future purchase, if the President's cancellation is invalidated. J.A. 114-15 (Cranney Dec. ¶ 26).

D. Proceedings Below

Appellees Snake River and Mike Cranney filed suit on October 21, 1997 against appellant Rubin in his official capacity. *Snake River Potato Growers, Inc., et al. v. Rubin,* Civ. No. 97-2463 (TFH) (D.D.C.). Appellees sought a declaratory judgment that the LIV Act is unconstitutional and that the President's purported cancellation of Section 968 is invalid. The complaint alleged subject-matter jurisdiction under both the special judicial review provision of

the Act, 2 U.S.C. § 692(a)(1), and the general federal question jurisdiction statute, 28 U.S.C. § 1331. The complaint alleged that Snake River and Cranney were concretely injured by the President's cancellation of Section 968 because they were deprived of business opportunities that Section 968 was designed to give them and because the cancellation had caused the termination of negotiations toward one specific transaction. The complaint alleged that the Act violates Article I of the Constitution because it impermissibly gives the President line-item veto power and authorizes him to repeal duly enacted provisions of tax and other laws.

The district court consolidated the *Snake River* suit with another action challenging a purported cancellation under the Act, *City of New York v. Clinton*, Civ. No. 97-2393 (TFH) (D.D.C.).[9] Appellants moved to dismiss the *Snake River* and *City of New York* actions on justiciability grounds, and all parties moved for summary judgment on the merits. On February 12, 1998, the court denied appellants' motions to dismiss, denied their motion for summary judgment, granted appellees' motions for summary judgment, and declared the LIV Act and the two cancellations at issue unconstitutional. J.S. App. 1a-33a.

With respect to standing, the district court held that "the Snake River plaintiffs suffered an immediate, concrete injury when the President canceled section 968." J.S. App. at 15a. The court determined that Section 968 had conferred a benefit on the *Snake River* appellees by enabling them to offer would-be sellers of processing facilities the same kind of tax-deferred sale transaction that an ordinary corporate purchaser can offer; as the court noted, an ordinary corporate purchaser can offer a tax-deferred stock-for-stock exchange, but a cooperative could not do

[9] A third action, *NTEU v. United States*, Civ. No. 97-2399 (TFH) (D.D.C.), was settled on statutory grounds.

the same because a cooperative's stock can be held only by its members. *Id.* at 16a. Citing *Northeastern Florida Chapter of the Associated General Contractors of America v. City of Jacksonville*, 508 U.S. 656 (1993), the district court ruled that the *Snake River* appellees had standing because the cancellation of Section 968 injured them in the process of bargaining for facilities, whether or not they could prove that any particular transaction would have been consummated. J.S. App. 16a-17a.

The district court also found that it was "highly likely" that the *Snake River* appellees would have been able to take advantage of Section 968. *Id.* at 17a. The court distinguished *Simon v. Eastern Kentucky Welfare Rights Org.*, 426 U.S. 26 (1976), and *Allen v. Wright*, 468 U.S. 737 (1984), as cases in which, although important general principles were involved, any actual injury to the plaintiffs was "entirely" or "purely" speculative. J.S. App. 19a-20a. The district court found the *Snake River* appellees' injuries to be more comparable to those asserted in *Bryant v. Yellen*, 447 U.S. 352 (1980), in which this Court held that farm workers had standing to challenge a regulatory suspension of a reclamation law because it was "likely" that the farm workers, if they prevailed, would have the opportunity to purchase farm lands at below-market prices. J.S. App. 18a.

The district court also rejected appellants' suggestion that appellee Cranney's declaration had not adequately demonstrated that the deal being discussed between Snake River and IPP, which was scuttled when the President canceled Section 968, would have qualified for favorable tax treatment under Section 968. The district court determined that, at a minimum, the discussions "make it clear . . . that Plaintiffs were actively spending their time and money pursuing purchases and that the President's cancellation of section 968 interfered with those plans." *Id.* at 21a. These concrete plans, the district court concluded, distinguished the case from *Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992). J.S. App. 21a.

On the merits, the district court determined that the LIV Act contravened the bicameralism and presentment requirements of Article I in two respects. First, the "laws that resulted after the President's line item veto were different from those consented to by both Houses of Congress." J.S. App. 24a. Congress, the district court found, "through a process of discussion and compromise, had agreed on the exact content of the Balanced Budget Act and the Taxpayer Relief Act," not on the truncated versions of those laws that resulted from the President's exercise of the cancellation power. *Id.* "Because the laws that emerged after the Line Item Veto are not the same laws that proceeded through the legislative process, as required, the resulting laws are not valid." *Id.* at 24a-25a. The constitutional prohibition against a Line Item Veto has been clear, the district court noted, since President Washington's tenure. *Id.* at 26a. Rejecting the notion that "the Framers spent significant time and energy in debating and crafting Clauses that could be easily evaded," *id.* (quoting *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 831 (1995)), the district court concluded that "Congress cannot evade this long-accepted requirement by merely changing the timing of the President's cancellation," *id.* at 26a.

Second, the district court found that the requirements of Article I were violated by the President's power of unilateral cancellation of parts of statutes. Repeals or amendments, the district court held, can be achieved only through "independent legislative enactment, which itself must conform with the requirements of Article I." *Id.* at 25a. The President "cannot single-handedly revise the work of the other two participants in the lawmaking process, as he did here when he vetoed certain provisions of these statutes." *Id.* The district court rejected the appellants' "curious[]" contention that "despite its title, the Line Item Veto Act does not authorize the President to 'veto' anything." *Id.* The court noted that by its plain terms, the LIV Act's definition of "cancel" authorizes the President to "rescind" or

to render a provision as having no "legal force or effect." *Id.* Quoting Richard Cardinal Cushing, the district court said, "When I see a bird that walks like a duck and swims like a duck and quacks like a duck, I call that bird a duck." *Id.*

The district court also held that the Act violates the separation of powers by transferring lawmaking power to the President.[10] The President's constitutional role, the district court held, is to "take care that the laws be faithfully executed"; his power cannot be expanded to that of "co-designer" of the law. *Id.* at 30a. By authorizing the President "in his discretion, to pick and choose among portions of an enacted law to determine which ones will remain valid," Congress violated the established principle that the "legislature cannot delegate its power to make a law." *Id.* at 29a (quoting *Field v. Clark*, 143 U.S. 649, 694 (1892)). The court said that no prior delegation of authority to the President was comparable to empowering the President to make "permanent changes to the text of the Internal Revenue Code, as he did in the Snake River case." *Id.* at 30a.

SUMMARY OF ARGUMENT

Standing. The *Snake River* appellees brought this case because they had suffered a concrete, redressable, pocketbook injury. Section 968 of the TRA was enacted to help farmers acquire, through farmers' cooperatives, processing and refining facilities. The congressional sponsors, appellants Clinton and Rubin, and appellees all believed that Section 968 *would* benefit farmers in this way. The undisputed record shows that appellee Cranney and other members of appellee Snake River had very recently purchased

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[10] Although the district court focused primarily on the separation of powers between the legislative and executive branches, it noted that the Act could also affect judicial independence by giving the President a new power to shape the judiciary's budget and exert pressure on its members. J.S. App. 27a n.14.

a processing facility, through another cooperative, in a transaction that was more expensive because Section 968 was not available. They formed appellee Snake River for the purpose of making such acquisitions with the anticipated help of Section 968. They were actively negotiating the first such purchase when the President's cancellation of Section 968 caused them to stop their efforts, which they would resume if Section 968 were restored.

Farmers and farm cooperatives such as appellees were the stated beneficiaries of Section 968 and the acknowledged victims of its cancellation. Moreover, this Court's decisions establish that a plaintiff who is actively pursuing specific business transactions, and whose pursuit is concretely impeded by governmental action, has standing to challenge that action even if he is not the person named in the governmental action. *E.g.*, *Bryant v. Yellen*, 447 U.S. 352 (1980). The Court's decisions also establish that such a plaintiff need not show that he would necessarily have completed any particular transaction, *e.g.*, *Northeastern Fla. Chapter of Associated General Contractors v. City of Jacksonville*, 508 U.S. 656 (1993), and here there was ample support for the district court's conclusion that pertinent transactions were "highly likely."

This case is very different from cases, cited by appellants, in which plaintiffs come to court to challenge a general principle whose impact on the plaintiffs themselves is at best speculative. *E.g.*, *Allen v. Wright*, 468 U.S. 737 (1984); *Simon v. Eastern Ky. Welfare Rights Org.*, 426 U.S. 26 (1976). The Snake River appellees came to court because Congress gave them an important economic benefit and the President took it away in an unlawful manner. They would "personally benefit in a tangible way from the court's intervention." *Steel Co. v. Citizens for a Better Environment*, 118 S. Ct. 1003, 1017 n.5 (1998).

The Merits. The finely wrought procedure set forth in Article I of the Constitution requires that every bill adding,

amending, or repealing any provision of federal law be passed in the same form by both Houses of Congress and presented to the President, who must sign, veto, or take no action with respect to each bill "in toto." These requirements are not empty formalities: they were carefully designed to assure that federal laws have the consent of the governed, expressed through their elected representatives. The LIV Act violates Article I by authorizing the President to "cancel" undesired provisions of a tax or spending bill in conjunction with the enactment of the bill, producing a truncated law not passed by either House of Congress. The Act's title, its structure (which mimics the veto process), and the objectives stated throughout its legislative history all confirm the intention to give the President a "final edit" that the Constitution does not permit him to have.

Appellants argue that the Act is saved by a *scintilla juris*: it requires the President first to sign the whole bill and only then, an instant or up to five days later, cancel the provisions he would have liked to veto. But at best this makes the Act merely an "indirect attempt[] to accomplish what the Constitution prohibits . . . accomplishing directly," *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 829 (1995), implying that "the Framers spent significant time and energy debating and crafting clauses that could be easily evaded," *id.* at 831. And in any event this too-clever device is itself unconstitutional because "repeal of statutes, no less than enactment, must conform with Art. I." *Chadha*, 462 U.S. at 954. "Cance" in this context means the same thing as "repeal," and under the Act the President's cancellation of Section 968 stripped a provision out of the Internal Revenue Code and permanently ended its "legal force or effect." Cancellation is an action that only Congress has the power to reverse, or to take.

Appellants' argument that the Act is a deemed part of each later tax or spending bill begs the question. Con-

gress could not adopt, for example, an "Internal Revenue Code of 1999" containing a provision authorizing the President to "cancel" any of its provisions within five days after enactment as long as he deems cancellation not contrary to the national interest. Such a provision would be swiftly condemned as an abdication of the responsibility to write the nation's tax laws, and the operation of the LIV Act in conjunction with the TRA is just as clearly an unconstitutional abdication.

The "fundamental precept . . . is that the lawmaking function belongs to Congress . . . and may not be conveyed to another branch." *Loving v. United States*, 116 S. Ct. 1737 (1996). The Act violates that precept. The "delegation" cases cited by appellants are not in point, because the Act does not delegate a discretionary power to the President to take care that the laws are faithfully executed. It conveys to him, acting alone, part of the power to shape the law itself, to alter the body of federal statutes that define the rights of private persons. Moreover, if the Court's delegation doctrine were applicable, the Act would violate it: the Act sets forth no "intelligible principles" constraining presidential exercise of the cancellation power—precisely because its intention was to give the President lawmaking powers.

ARGUMENT

I. THIS CASE IS JUSTICIABLE

A. "Prudential" Standing Is Not at Issue.

The Act provides that "Any . . . individual adversely affected by [the Act] may bring an action . . . for declaratory judgment and injunctive relief on the ground that any provision of [the Act] violates the Constitution." 2 U.S.C. § 692(a)(1). This provision "eliminates any prudential standing limitations." *Raines v. Byrd*, 117 S. Ct. 2312, 2318 n.3 (1997) (citing *Bennett v. Spear*, 117

S. Ct. 1154, 1162-63 (1997)); *id.* at 2323 n.1 (Souter, J., concurring). Appellants do not disagree.[11]

B. Appellees Have Constitutional Standing To Challenge the Line Item Veto Act.

The requirements for Article III standing are not in dispute. "To meet the standing requirements of Article III, '[a] plaintiff must allege personal injury fairly traceable to the defendant's allegedly unlawful conduct and likely to be redressed by the requested relief.'" *Raines v. Byrd*, 117 S. Ct. at 2317 (quoting *Allen v. Wright*, 468 U.S. 737, 751 (1984) (emphasis deleted)). The alleged injury must amount to "invasion of a legally protected interest which is (a) concrete and particularized . . . and (b) 'actual or imminent.'" *Defenders of Wildlife*, 504 U.S. at 560 (citation and footnote omitted). This Court recently emphasized that this doctrine can be boiled down to a fundamental inquiry: "whether a plaintiff 'personally would benefit in a tangible way from the court's intervention.'" *Steel Co. v. Citizens for a Better Environment*, 118 S. Ct. 1003, 1017 n.5 (1998) (quoting *Warth v. Seldin*, 422 U.S. 490, 508 (1975)).

The *Snake River* appellees came to court because they had suffered a concrete and redressable injury to their pocketbook interests. Cranney and other farmer members of Snake River want to own and control potato processing facilities so that, among other things, they are not solely at nature's mercy in selling their crops but can store their crops and time their sales to fit the market. Section 968 was designed specifically to help farm cooperatives purchase such facilities, and its congressional sponsors and the President, as well as appellees themselves, believed that Section 968 *would* help. Members of Snake River had pursued such a purchase in another cooperative, completing one that was in fact more expensive because Section 968 was not available. Snake River itself

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[11] *But see* n.1, *supra*.

was formed for the specific purpose of making such purchases, and it was actively discussing the first such purchase with a seller who appeared to be interested on the assumption that Section 968 would allow nonrecognition of his gain for tax purposes. *See* pp. 8-11, *supra*. The President's cancellation of Section 968 injured appellees not only by bringing those discussions to an end but by impeding a planned program of acquisitions. This case is very different from this Court's cases in which plaintiffs sought to litigate general principles whose impact on the plaintiffs themselves was highly doubtful.

Appellants argue that because the taxpayer directly affected by new Section 1042(g) was the *seller* of processing facilities, would-be *purchasers* do not have standing to challenge its cancellation. *See* Brief For Appellants ("Gov. Br." or "Br.") 26-27. But, first, this Court has repeatedly held that a party has constitutional standing to complain of genuine injury to himself resulting from governmental regulation of someone else. *See, e.g., Bennett v. Spear*, 117 S. Ct. 1154 (1997) (water users had standing to complain of regulatory action affecting other demands for water); *Bryant v. Yellen*, 447 U.S. 352 (1980) (farmers wishing to purchase land had standing to complain of allegedly unlawful regulatory suspension of law relating to the irrigation rights of others).

Moreover, the specific objective of Section 968 was to help farm cooperatives like Snake River and farmers like Cranney. They were the intended beneficiaries of Section 968 and the victims of its cancellation. The text and structure of Section 968 make this clear: the statute was available to any would-be seller, but it limited the class of purchasers to "eligible farmers' cooperatives," *see* J.S. App. 73a, because the purpose was to benefit them. The congressional sponsors, other members of Congress, and appellant Clinton all clearly acknowledged the point.[12]

[12] *See, e.g.*, H.R. Rep. No. 105-148, at 420 (1997); J.A. 116-17 (*Letter from Congressmen Pat Roberts and Charlie Stenholm* (Dec. 1, 1995)); J.A. 118-120 (Press Release, *Hulshof Introduces Farmer-Friendly Legislation* (May 30, 1997)); 141 Cong. Rec. S18739 (daily ed. Dec. 15, 1995) (statement of Senator Hatch); *id.* (statement of Senator Craig); J.S. App. 71a (President's cancellation message); *Transcript of Press Briefing by Treasury Secretary Bob Rubin, OMB Director Frank Raines, Director, National Economic Council Gene Sperling*, at 6 (White House Aug. 11, 1997) (Record at Docket Entry 14 (*see* J.A. 8), App. Tab 19). *See generally* pp. 5-8, *supra*.

The President said he regretted vetoing Section 968 because it would have supported "family farmers, farm cooperatives, and the acquisition of production facilities by co-ops." *See* p. 8, *supra*, citing J.A. 125 (33 Weekly Comp. Pres. Doc. 1225, 1226 (Aug. 11, 1997)).

The Court has said that when a party is the very object of challenged government action, "there is ordinarily little question that the action or inaction has caused . . . injury, and that a judgment preventing or requiring the action will redress it." *Defenders of Wildlife*, 504 U.S. at 561-62. Appellants assert (Br. 26) that appellees are *not* the "objects" of Section 968 because they are not the taxpayers. But this avoids the central point: where Congress specifically intends to benefit a class of which the plaintiff is a member, and the President specifically intends to take that benefit away from that class, a court begins with their judgments—not merely the plaintiff's assertion—that their actions will in fact affect the plaintiff. Appellees are the "objects" of the governmental action in that sense here. Congress and the President expected Section 968 to help farmers' cooperatives and their members and expected its cancellation to hurt them, and appellants are in the position of quarreling with these expectations.[13]

[13] Appellants note (Br. 27) that the government has traditionally sought to confine tax litigation to cases in which the taxpayer is a party. But that concern is reflected in, and answered by, statutory limitations not applicable here. *E.g.*, 26 U.S.C. § 7421(a) (Anti-Injunction Act). There is no doubt that a variety of persons (*e.g.*, heirs, donees, employees, or vendees) can have a *constitutionally*

Appellants next contend (Br. 27-31) that appellees' injuries are fatally speculative because appellees cannot establish with certainty that they would have consummated any particular purchase if Section 968 had not been canceled. But the Court has repeatedly held that a plaintiff who is actively pursuing a prospective acquisition of property, or actively negotiating a prospective contract, has standing to challenge government action that concretely and adversely affects the *process* of pursuit, without showing that the challenged action necessarily altered the outcome. *E.g.*, *Bennett*, 117 S. Ct. at 1163-65 (water users had standing to challenge report that threatened to reduce total available quantity of water and, indirectly, their own supply); *Northeastern Fla. Chapter of the Associated Gen. Contractors v. City of Jacksonville*, 508 U.S. 656, 666 (1993) (non-minority contractors had standing to challenge minority preference in government contracting process without showing that they would have received contracts in absence of preference);[14] *Yellen*, 447 U.S. at 366-68 (would-be purchasers of farmland had standing to challenge change of irrigation policy affecting motivations of sellers; plaintiffs had not identified any particular farmland for purchase); *Village of Arlington Heights v. Metropolitan Hous. Dev. Corp.*, 429 U.S. 252, 261-62 (1977) (when challenged government action stands as a barrier

sufficient interest in another person's taxes. *See United States v. Williams*, 514 U.S. 527, 538-39 (1995); *South Carolina v. Regan*, 465 U.S. 367 (1984); *cf. National Credit Union Admin. v. First Nat'l Bank & Trust Co.*, 118 S. Ct. 927, 933 n.4 (1998).

[14] Appellants argue that the district court's reliance on *Associated General Contractors* is "misplaced" because appellees "have not asserted an equal protection claim." Br. 33. But appellants have missed the district court's point: *Associated General Contractors* plainly holds that if a business entity is actively seeking an advantageous contract, for which it is qualified, it has standing to challenge illegal governmental action that makes it significantly harder for the entity to achieve its goal. Appellees are claiming exactly that kind of injury in a business negotiating process (albeit resulting from a different alleged constitutional violation) in this case.

to consummation of a detailed and specific project, court is not required to engage in undue speculation about likely success of project; business uncertainties attending every transaction should not operate to defeat standing); *Secretary of State v. Joseph H. Munson Co.*, 467 U.S. 947, 954-55 (1984) (characterizing as an "actual injury" a charity's "reluct[ance] to enter into a contract" with a plaintiff fundraiser because of a challenged statutory limitation).[15]

Appellants' claims fit comfortably within this category of cases. Snake River was formed for the express purpose of purchasing processing and refining facilities, and it was taking concrete and specific steps toward the first such purchase (and planned to pursue others as well) from among the "ample" supply of potato "processing facilities in the state of Idaho." J.A. 111 (Cranney Dec. ¶ 14); *see* pp. 9-11, *supra*. The cancellation of Section 968 thwarted these plans; it deprived Snake River of the valuable opportunity to offer sellers a tax saving, and it put Snake River at a competitive disadvantage vis-a-vis ordinary business corporations that can acquire processor companies in stock-for stock transactions that afford nonrecognition treatment to the seller.[16] Appellants suggest

[15] *Cf. Allen v. Wright*, 468 U.S. 737, 751 (1984) (emphasizing that relief need only "be 'likely' to follow from a favorable decision.").

[16] Appellants respond to the district court's conclusion that Section 968 "put [appellees] on equal footing with their competitors and its cancellation disabled them from competing on an equal basis," J.A. App. 16a-17a, by arguing that ordinary corporations face an offsetting disadvantage because they are taxed at both the corporate and the shareholder level. *See* Br. 32 n.16. But appellants' argument is no answer to the district court's finding, J.S. App. 9a, that ordinary corporations can use tax-free exchanges to compete for processing facilities at an advantage over farmers' cooperatives. *See, e.g.*, J.A. 111 (Cranney Dec. ¶¶ 12, 15); 141 Cong. Rec. S18739 (daily ed. Dec. 15, 1995) (statement of Senator Craig). From the perspective of a *seller*, the pertinent tax consequence is whether the seller is taxed on his capital gain.

that the district court engaged in " 'unadorned speculation,' " *see* Br. 29-30, but it is appellants who are speculating when they imply that hard-working farmers were wasting their time.[17]

Bryant v. Yellen, 447 U.S. 352, is particularly instructive. The Court ruled in that case that would-be purchasers of farmland could challenge the Secretary of Interior's suspension of reclamation laws barring delivery of federal irrigation water to any parcel of land larger than 160 acres held by a single owner. Plaintiffs argued that they were injured by the suspension because, if it were lifted, owners of larger parcels would sell their "excess"

[17] All complex corporate transactions require working out of details, but contrary to appellants' lengthy footnote (Br. 29-30 n.13), there is no reason to believe that the Snake River appellees could not have accomplished the IPP transaction and other transactions in a manner that would qualify under Section 1042(g). First, there is no dispute that Snake River is an "eligible farmers' cooperative." Second, on its face Section 1042(g) would not have required either the cooperative or the processor company to have been in existence a full year; on the contrary, farmers who "make up" the cooperative can have made eligible sales, and a processor company that has bought more than half its crops from such farmers for its whole life would be in full literal compliance. But if it had been necessary for Snake River to contract for a year of crop sales culminating in a purchase of the processor company, there was no obstacle to doing so. (This Court has often found standing where the completed injury was a year or more away. *E.g.*, *Metropolitan Washington Airports Auth. v. Citizens for the Abatement of Aircraft Noise, Inc.*, 501 U.S. 252 (1991); *Duke Power Co. v. Carolina Envtl. Study Group, Inc.*, 438 U.S. 59 (1978); *Bennett v. Spear*, 117 S. Ct. 1154 (1997).) Third, contrary to the contention that a transfer of the processing facility by IPP to a wholly owned subsidiary would be a taxable event, an owner interested in selling processing facilities could place them in corporate solution before making any "agreement," Rev. Rul. 70-140, 1970-1 C.B. 73, or "irrevocable contract," *Intermountain Lumber Co. v. Comm'r*, 65 T.C. 1025 (1976), and thus achieve tax free incorporation. *See* Boris I. Bittker & James S. Eustice, *Federal Income Taxation of Corporations and Shareholders* ¶ 3.09[2] (6th ed. 1997); Tech. Adv. Mem. 87-35-009 (May 29, 1987).

lands at "below market" prices in order to qualify for irrigation deliveries.[18] The Court acknowledged that the would-be purchasers "could not with certainty establish that they would be able to purchase excess lands if [the suspension were lifted]," *id.* at 367, but concluded that it was "highly improbable" that landowners would prefer to go without irrigation instead of selling enough lands to meet the 160 acre limit, *id.* at 367-68. Snake River's standing is if anything clearer than the standing of the would-be purchasers in *Yellen*, who were not the stated beneficiaries of the irrigation policy or the targets of the Secretary's suspension of that policy and could not allege any ongoing negotiations or specific plans.[19]

Appellants cite (Br. 27-28) *Allen v. Wright*, 468 U.S. 737 (1984), and *Simon v. Eastern Kentucky Welfare Rights Organization*, 426 U.S. 26 (1976), but those cases are very different from this one. In each, the plaintiffs were pursuing what they saw as an important general constitutional principle, but the connection between the challenged government action and any injury to the plaintiffs themselves was "attenuated at best," *Allen*, 468 U.S. at 757, or "purely speculative," *Simon*, 426 U.S. at 42. In *Allen*, plaintiff parents of minority public school students challenged tax exemptions for racially discriminatory private schools, but the Court held they could not

[18] The pertinent provision of the reclamation law would have required landowners of greater than 160 acres to sell "excess" land at scheduled prices that did not reflect the value of federal irrigation rights. *Id.* at 367 n.17.

[19] Appellants contend that the irrigation policy in *Yellen* could be expected to have a "determinative or coercive effect," Br. 30-31 n.14 (quoting *Bennett v. Spear*, 117 S. Ct. at 1164), but the *Yellen* Court noted that "[t]he Court of Appeals . . . recogniz[ed] that no owner of excess lands would be required to sell," *Yellen*, 447 U.S. at 367. The likelihood of successful purchases by the *Yellen* plaintiffs, who apparently had presented no evidence that they could afford any particular parcel, was if anything smaller than the likelihood of successful purchases by the *Snake River* appellees, who were actively pursuing such purchases.

show personal injury because there were "[not] enough racially discriminatory private schools receiving tax exemptions to make an appreciable difference in public school integration." 468 U.S. at 757-58. In *Simon*, indigent plaintiffs challenged a revenue ruling reducing the level of service to indigents required for a hospital to enjoy a tax exemption; the Court said any personal injury to the plaintiffs was impermissibly speculative because the hospitals, which received a very small percentage of their revenues from deductible donations, might well forgo the favorable tax treatment rather than suffer the financial drain of additional uncompensated services. 426 U.S. at 42-43.

Appellants seek to bring this case within the principle of *Allen* and *Simon* by asserting that "the likely tax treatment of any capital gain is only one of many factors bearing on a processor's decision whether to [sell]." Br. 28. But here, that tax benefit is neither remote from any actual effect on plaintiffs (as in *Allen*) nor offset by countervailing costs (as in *Simon*). Any particular owner of facilities might have any number of reasons for not selling them, but members of appellee Snake River had completed one actual transaction with a seller who insisted on nonrecognition, and Snake River and Cranney were at work on another transaction with a seller who was interested but only on a nonrecognition basis, and "ample" other facilities were available for their active pursuit. There was abundant support for the district court's finding that it was "highly likely" (J.S. App. 17a) that appellees could take advantage of Section 968.[30]

[30] Appellants also make a redressability argument, not made below, that the district court's declaratory judgment that the Act is unconstitutional does not redress appellees' injury because it will not be binding in the *seller's* tax case. The answer to this is that appellees and all other concerned persons have a right to expect the United States to honor a judgment rendered by the district court specifically charged by Congress with hearing expedited challenges to the Act's constitutionality, 2 U.S.C. § 691, particularly if it is affirmed by this Court. "For the purposes of establishing standing . . . [appellees] may assume it is substantially likely that the President and other executive and congressional officials would abide by an authoritative [ruling] . . . by the District Court." *Franklin v. Massachusetts*, 505 U.S. 788, 803 (1992) (plurality); *see Glidden Co. v. Zdanok*, 370 U.S. 530, 571 (1962). Appellees refrained from seeking injunctive relief only out of respect for the Executive Branch and its unquestioned obligation to "defer to the Judicial Branch for final resolution of questions of constitutional law." *United States v. Mendoza*, 464 U.S. 154, 161 (1984).

The *Snake River* appellees brought their suit because they "personally would benefit in a tangible way from the court's intervention." *Warth v. Seldin*, 422 U.S. at 508. Appellees are seeking neither "psychic satisfaction" from seeing "that the nation's laws are faithfully enforced," *Steel Company*, 118 S. Ct. at 1019, nor to have this Court determine the constitutionality of the LIV Act "*in thesi*," *Marye v. Parsons*, 114 U.S. 325, 328-30 (1885). They are here because the President's cancellation of Section 968 injured them in their pocketbooks by denying them the concrete economic help that Congress had given them.

II. THE LINE ITEM VETO ACT AND THE PRESIDENT'S CANCELLATION OF SECTION 968 OF THE TAXPAYER RELIEF ACT OF 1997 ARE UNCONSTITUTIONAL

The Constitution vests "[a]ll legislative Powers" in Congress. U.S. Const. art. I, § 1. It requires that every bill adding, amending, or repealing a provision of federal law be passed, in the same final form, by both Houses. It gives the President only a qualified check on this process: he has only the power to approve or "return" a whole bill that has been presented to him, and his power of "return" is subject to override by two-thirds of each House. *Id.* § 7, cl. 2. The requirement of bicameral passage of laws, with only a limited and essentially negative formal role for the President, is one of the foundations of our government, and this Court has, when necessary, acted decisively to preserve it. *See, e.g., Youngstown Sheet & Tube Co.*

v. Sawyer, 343 U.S. 579, 587 (1952); *Buckley v. Valeo*, 424 U.S. 1, 129 (1976); *INS v. Chadha*, 462 U.S. 919 (1983); *Bowsher v. Synar*, 478 U.S. 714 (1986). The President's constitutional role is not to make or unmake laws unilaterally, but to "take Care that the Laws be faithfully executed." U.S. Const. art. II, § 3.

The Act violates the constitutional plan by authorizing the President to make laws that neither House has passed. The Act's purpose, clearly stated in its title and its legislative history, is to give the President the power, in conjunction with signing a bill, to return some of its provisions, leaving a truncated statute in place of the one Congress enacted. The drafters of the Act sought to avoid constitutional objections to such an item veto by requiring the President to sign the whole bill and only then cancel undesired provisions. But that mechanism, too clever by half, is also unconstitutional. It empowers the President, acting alone, to repeal provisions of federal statutes—for example, in this instance, permanently eliminating a congressionally enacted provision of the Internal Revenue Code—in violation of the bicameral passage and presentment requirements of Article I.

Appellants (and amicus Senate) acknowledge that Article I does not permit Congress to give the President item-veto power. *See* Gov. Br. 34; *see also* Brief for United States Senate as Amicus Curiae ("Sen. Br.") 18. And they do not contend that Article I permits Congress to give the President alone the power to repeal a federal statute. Instead, they argue that the Act does not (despite its title) confer item-veto power on the President, because it requires that the President first sign a whole bill and only then strike the items he does not like. Gov. Br. 34-35; Sen. Br. 18. They then argue that "cancellation" of a provision, although it renders the provision permanently without "legal force or effect," is not a repeal but an exercise of the President's power under Article II of the Constitution to "take Care that the Laws be faithfully executed," because the Act itself makes future spending and revenue items subject to cancellation. Gov. Br. 36-40; Sen. Br. 19-20. But appellants struggle in vain: the Act changes the way federal laws are made and unmade, in violation of both the structural principles and the procedural specifics of Article I.

A. Article I Prescribes the Exclusive Means for Making, Amending, and Repealing Federal Laws.

The heart of the Constitution's "finely wrought . . . procedure" for the passage of legislation is bicameral passage. The Framers "provid[ed] that no law could take effect without the concurrence of the prescribed majority of the Members of both Houses." *Chadha*, 462 U.S. at 948. Congressional enactment of all laws is, of course, fundamental to the principle of government by the consent of the governed.[21] And the Framers required passage by both Houses in the same final form quite deliberately, both because it would assure careful and prudent judgment in legislating, *see* The Federalist No. 22 (Hamilton), No. 51 (Madison); *Chadha*, 462 U.S. at 948-51 (citing 1 *The Records of the Federal Convention of 1787*, at 254 (Max Farrand ed. 1966) (statement of James Wilson)), and because it was essential to the "Great Compromise"

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[21] The concept that the laws, and tax laws in particular, must have the consent of the people expressed through their representatives was both a cause of the American Revolution and a purpose for drafting the United States Constitution. *See generally* John Phillip Reid, *The Concept of Liberty in the Age of the American Revolution* (1989). The Stamp Act Congress declared it to be "essential to the freedom of a people . . . that no taxes should be imposed on them, but with their own consent, given personally, or by their representatives." *Journal of the First Congress of the American Colonies, in Opposition to the Tyrannical Acts of the British Parliament Held at New York October 7, 1765*, at 27-29 (1845). And prominent among the "injuries and usurpations" of the King, identified by the 1776 Congress in the Declaration of Independence, was "imposing Taxes on us without our Consent." *Declaration of Independence* (U.S. 1776).

between the large and small states that enabled the Convention to agree on a Constitution.[22]

The "Presentment Clause," art. I, § 7, cl. 2, requires that every bill passed by both Houses be presented to the President, and it gives him exactly three choices: "[1] If he approves he shall sign it, but [2] if not he shall return it, with his Objections . . ." or [3] he may do nothing, in which case in ten days "the Same shall be a Law, in like Manner as if he had signed it," unless the pocket veto clause applies. These words make it clear that the President may act (or not act) only on the whole bill exactly as it is presented to him: he must consider the "Bill which shall have passed the House of Representatives and the Senate" and make an up-or-down judgment on whether "it" should become law. As the district court said, and appellants acknowledge (Br. 34), the Presentment Clause permits the President only to accept or reject a bill in toto. *See also Field v. Clark*, 143 U.S. 649, 669 (1892) (There is "no authority . . . in the President to approve . . . as a legislative act, any bill not passed by Congress.").

This "in toto" requirement has structural importance.[23] First, it protects the principle of bicameralism: It could not be said that both Houses of Congress have exercised their best judgment, and approved each provision of a law, were it not for the requirement that their handiwork, in its final form, must take effect unedited by the President. The requirement also limits the President's power in the lawmaking process by denying to him the unilateral

[22] Giving the smaller states equal representation in the Senate and the larger states proportionate representation in the House of Representatives is a workable compromise only because both the Senate and the House must pass the same bill in its final form.

[23] *See Chadha*, 462 U.S. at 958 n.23 ("The legislative steps outlined in Art. I are not empty formalities; they were designed to assure that both Houses of Congress and the President participate in the exercise of lawmaking authority.").

power to revise the work of the other participants. And unlike the House and Senate, each of which has the absolute power to block passage of a bill it disfavors, the President has only a qualified blocking power that Congress may override. It would be especially anomalous if the President, the only one of the three participants whose approval is *not* always required for a bill to become law, had the power to revise the work of the other two.[24]

The requirement that the President sign, veto, or leave unsigned the bill as a complete whole has been clear since the first Presidency. As George Washington explained the limitation on his authority, "From the nature of the Constitution, I must approve all the parts of a Bill, or reject it in toto." 33 *Writings of George Washington* 96 (John C. Fitzpatrick ed. 1940). Eighteenth century explanations of the Presentment Clause are consistent with Washington's view. *See generally* 12 Op. Off. Legal Counsel 128, 157-58 (1988). Later Presidents have likewise understood that they could not approve or disapprove only parts of a bill.[25]

[24] According to Hamilton, the Constitution does not give the President any "legislative Powers" but only "a salutary check upon the legislative body" that begins only after both Houses have passed a bill. The Federalist No. 73 (Hamilton). In the Pennsylvania Ratifying Convention, James Wilson denied that the Presentment Clause would give the President legislative power, stating that the language of the clause was precise: " 'If he approve the bill, when it is sent, he shall sign it, but if not, he shall return it;' but no bill passes in consequence of having his assent: therefore, he possesses no legislative authority. [If the President vetoes a bill, but his veto is overridden] it becomes a law, not by his [authority], but by the authority of the two houses of the legislature." 2 *Debates in the Several State Conventions on the Adoption of the Federal Constitution* 473 (Jonathan Elliot ed. 1836).

[25] *See, e.g., The Line-Item Veto: A Constitutional Approach: Hearing on S.J. Res. 2 and S.J. Res. 16 Before the Subcomm. on the Constitution, Federalism, and Property Rights of the Senate Judiciary Comm.*, 104th Cong. 40 (1995) (statement of Ass't Att'y Gen. Dellinger); 12 Op. Off. Legal Counsel 128, 157-65 (1988)

B. The Line Item Veto Act Transfers to the President Lawmaking Power That the Constitution Does Not Permit Congress To Surrender.

The full title of the Act is "An act to give the President line item veto authority with respect to appropriations, new direct spending, and limited tax benefits." H.R. Conf. Rep. No. 104-491, at 14 (1996). Appellants and amicus Senate urge the Court to avert its eyes from this title, arguing that it is inaccurate, but the title conveys precisely what the Act does and was intended to do:

> The Line Item Veto Act purports to establish a procedure for the creation of laws that are truncated versions of bills that have been passed by the Congress and presented to the President for signature. If the procedure were valid, it would deny every Senator and every Representative any opportunity to vote for or against the truncated measure that survives the exercise of the President's cancellation authority.

Raines v. Byrd, 117 S. Ct. 2312, 2325 (1997) (Stevens, J., dissenting).

The Act was carefully designed to mimic the item-veto power that appellants and amicus Senate concede would be unconstitutional. Its power of cancellation can be exercised only in direct connection with signing a bill into

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(describing the view of Presidents Washington, Grant, Hayes, Taft, Wilson, Ford, and Reagan that they were required to sign or return multiple-item bills in toto, even though they favored some items and disfavored others); 9 Op. Off. Legal Counsel 28, 29 (1985); William Howard Taft, *The Presidency: Its Duties, Its Powers, Its Opportunities and Its Limitations* 11 (1916) ("[The President] has no power to veto parts of the bill and allow the rest to become a law. He must accept it or reject it, and even his rejection of it is not final unless he can find one more than one-third of one of the houses to sustain him in his veto."). *See generally Line Item Veto: The President's Constitutional Authority: Hearing on S. Res. 195 Before the Subcomm. on the Constitution of the Comm. on the Judiciary*, 103d Cong. (1994).

law.[26] The power is limited to canceling one or more "items" in the bill "in whole." The cancellation does not merely suspend or terminate implementation of the provision; it renders the provision without "legal force or effect," depriving everyone (including the President himself) of all further authority thereunder. The cancellation is permanent; canceled provisions can become law again only if a new statute is enacted in the full constitutional manner. And within the vetoable categories, the Act gives the President *no* meaningful substantive instructions or guidance but instead leaves him to make the same kind of decision he makes in any other exercise of his veto power: whether in his sole judgment an "item" would be a good or bad law. The whole point was to grant him the practical power to accept some parts of a bill and reject others.

Congress fully intended to give the President just such a fundamentally legislative role. In general, the Act was the outgrowth of a lengthy effort to confer on the President the item-veto power that 43 state *constitutions* give to their governors—but without amending the U.S. Constitution.[27]

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[26] The Act gives the President up to five days to cancel items, but this allowance of a little additional time is of no practical or constitutional significance. The stated intention was that the President cancel "as soon as possible," and the five days were allowed for administrative convenience. H.R. Conf. Rep. No. 104-491, at 22 (1996). The significant point is that the cancellation was expected to occur in conjunction with signing, and without any intervening event or change in circumstances.

[27] Although the 104th Congress considered constitutional amendments to give the President the item veto power, none was ever voted on. S.J. Res. 2, 14, 15 & 16, 104th Cong. (1995); H.J. Res. 4, 6 & 17, 104th Cong. (1995); *see also The Line-Item Veto: A Constitutional Approach: Hearing on S.J. Res. 2 and S.J. Res. 16 Before the Subcomm. on the Constitution, Federalism, and Property Rights of the Comm. on the Judiciary*, 104th Cong. (1995). A statutory alternative, offered on the Senate Floor, was to give the President the equivalent of item veto power through "separate enrollment": after a spending or tax bill had been agreed upon by both Houses, the enrollment clerks divide it into separate items and

But Congress had a more pointed purpose as well: Members who believed that Congress was politically incapable of limiting expenditures decided that it would be desirable to abdicate that responsibility to the President.[28] Congress was quite clear that the intention was to invert the lawmaking process: "Presidential proposals [for cuts] will now become law unless Congress takes action to stop them." H.R. Rep. No. 104-11, pt. 2, at 9. As the Conference Report summarized, "The purpose of the [Act] is to promote savings by placing the onus on Congress to overturn the President's cancellations of spending and limited tax benefits." H.R. Conf. Rep. No. 104-491, at 16. Thus, the LIV Act intentionally "hands off to the President authority [over] fundamental legislative choices" as to which federal programs and activities are worth their cost and which are not. *Byrd v. Raines*, 956 F. Supp. 25, 37 (D.D.C.), *op. vacated*, 117 S. Ct. 2312 (1997).

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prepare a separately enrolled bill for each item; Congress would then pass the bills en masse, but the President could then sign or reject each bill separately. *See* S. 4, 104th Cong. (1995) (offered in Amendment No. 347); 141 Cong. Rec. S4188-89 (daily ed. Mar. 20, 1995). Both constitutional and administrative objections were raised to this cumbersome process, and although it passed the Senate, it did not survive the Conference. *See generally* H.R. Conf. Rep. No. 104-491; *see also* 141 Cong. Rec. S4217 (daily ed. Mar. 21, 1995) (statement of Sen. McCain); *id.* at S4224-35 (statement of Sen. Byrd); *id.* at S4244 (statement of Sen. Exon).

[28] *E.g.*, 142 Cong. Rec. S2955-57 (daily ed. Mar. 27, 1996) (statement of Sen. Stevens) (supporting the LIV Act and describing it as "the most significant delegation of authority by the Congress to President since the Constitution was ratified in 1789" and as "a major change in the balance of Government power"); *id.* at S2960 (statement of Sen. Gramm) ("no doubt about it . . . it changes the balance of power between the Congress and the President in one fundamental way: It gives the President enhanced power to say 'no' to spending."); *id.* at S2978 (statement of Sen. Kyl) ("[T]he Line-Item Veto Act is a good bill, but one that should not be necessary. Congress should always have the good sense to spend taxpayers' hard-earned money wisely . . . . Make no mistake about it, this bill will shift a great deal of new power to the President.").

Congress, if it disagrees with him, then has the "onus" of passing laws (if necessary, over his veto[29]) to overturn the essentially legislative actions the President has taken. The Act has turned on its head the constitutional lawmaking process, under which Congress legislates with only limited and qualified presidential participation, after which the President takes care that the laws are faithfully executed.

Defendant and amicus Senate argue that this grant of item-veto power to the President is saved by a *scintilla juris*. Gov. Br. 34-36; Sen. Br. 17-19. While conceding that Congress could not constitutionally give the President power to strike some provisions of a bill and sign only the remainder into law, they argue that this constitutional barrier has been circumvented by requiring the President to sign a whole bill (perhaps with the fingers of his other hand crossed) and then, an instant or up to five days later, strike the provisions that he does not approve, whether they be 5% or 95% of the bill. There are two answers to this argument.

First, at best, the *scintilla juris* is merely a device supporting a forbidden "indirect attempt[] to accomplish what the Constitution prohibits . . . accomplishing directly." *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 829 (1995). The device treats the steps prescribed by Article I as "empty formalities," contrary to *Chadha*, 462 U.S. at 958 n.22. The instant of time is of course of no practical significance: the Act gives the President exactly the same power of final revision that President Washington knew the Constitution did not give him. The result of the whole, essentially unitary process (which if upheld in this case could be applied in the future to federal legislation of any kind whatever) is that the President edits the laws *as* they take effect, producing "truncated versions" not

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[29] As noted by amicus Senate, the President has vetoed the only disapproval bill passed to date by Congress. Sen. Br. 17.

passed by either house. *See Raines v. Byrd*, 117 S. Ct. at 2325 (Stevens, J., dissenting). The whole idea was to circumvent Congress's supposed inability to pass such truncated laws. To allow this device to succeed is to conclude that "the Framers spent significant time and energy in debating and crafting Clauses that could be easily evaded." *U.S. Term Limits*, 514 U.S. at 831.

Second, the Act in any event trips over its own strategy. A provision that has become law, even if only for an instant, may be repealed only by the full Article I process. *Chadha*, 462 U.S. at 954 ("repeal of statutes, no less than enactment, must conform with Art. I"). But the "cancellation" under the Act of Section 968 of the TRA, deleting Section 1042(g) of the Internal Revenue Code, was neither more nor less than a unilateral repeal of that provision. The verb "cancel," when its direct object is an existing statute, means the same thing as "repeal," [30] and Congress used the words interchangeably in drafting the Act.[31] The two words plainly have the same meaning here: the "cancellation" of Section 968 did not merely suspend the operation of I.R.C. § 1042(g). The cancellation killed the section itself, permanently ended its "legal force or effect," and stripped it out of the Internal Revenue Code unless and until a new statute adds it back. If the President later changes his mind, or reaches a different judgment based on experience, or if circumstances change so as to make the canceled tax benefit appear desirable, he cannot revive Section 1042(g) by himself but must instead seek passage of a new law through the full Article I process.

[30] The Act defines "cancel" to mean "to prevent . . . from having legal force or effect" with respect to items of new direct spending or limited tax benefits and to "rescind" with respect to discretionary budget authority. 2 U.S.C. § 691e(4). The first dictionary definition of the verb "repeal" is "1: to rescind or revoke (as a sentence or law) from operation or effect." *Webster's Third New International Dictionary* 1924 (1971).

[31] The House-passed version of the Act, H.R. 2, in fact used the terms "veto" and "repeal," and the related committee report confirmed that repeal was intended: "Any provision of law [vetoed under this Act], as set forth in a President's special message, shall be deemed repealed unless a rescission/receipts disapproval bill restoring that provision is enacted into law." H.R. Rep. No. 104-11, pt. 2, at 14 (1995); *see* H.R. 2, 104th Cong. §§ 2, 3(a)(1)-(2) (1995).

Appellants note that the Act provides that canceled items can again become law if Congress passes a "disapproval bill." Br. 34-35 n.20. But the disapproval bill provision does nothing to rescue the Act. A disapproval bill is a new law, requiring bilateral passage, presentment, and if there is a veto, congressional override. *See* 2 U.S.C. § 691d. Any provision of federal law can be enacted in that manner. (The Act merely provides for expedited congressional consideration of this class of bills.) And more fundamentally, the opportunity to consider a disapproval bill does not cure the basic defect: Under the Act, Congress is *never* given the opportunity to vote on the truncated law that resulted from the President's cancellation. The basic question for this Court is *not* whether an unconstitutional veto can be overcome but whether the enacted "truncated version" has received the consent of the governed through the Article I process.

Appellants argue (Br. 37-40) that there is no constitutional problem because the Act itself, which was adopted in the constitutional manner, authorizes the future cancellations and is deemed to be part of every future spending or tax statute. That argument merely begs the question, which is whether Congress can give the President power to "cancel" provisions of law as it has done here. The answer to that question is "no" whether Congress does so in advance, as it has done in the Act, or in the very law whose provisions are subject to cancellation.[32]

[32] Appellants argue (Br. 38) that Congress was "aware" when it passed the TRA that the LIV Act would allow the President to

To take a simple example that is not very far from the present case, suppose that Congress passed, and the President signed, an "Internal Revenue Code of 1999" replacing the entire 1986 Code and containing, as Section One, a provision stating, "The President may, within five days after signing this Code into law, cancel any provision hereof if in his judgment such cancellation will save money, not impair any essential government function, and not harm the national interest. Congress may restore any such provision by passing a new law in the manner prescribed in Article I of the Constitution." This Court, we respectfully suggest, would have little difficulty concluding that in adding such a provision Congress had simply abdicated its responsibility to write the tax laws of the United States. If such a law were constitutional, it is impossible to imagine a lawmaking task that Congress could not find a way to surrender to the President.

The LIV Act, and its operation in conjunction with the TRA, are equally unconstitutional. If appellees grant, *arguendo*, appellants' premise that the LIV Act should be thought of as "incorporated into" the TRA, and add the fact that pursuant to the Joint Committee's determination (*see* pp. 4 n.2, 7-8, *supra*) the TRA itself allows the President to cancel "only" 79 of its provisions as limited tax benefits, *see* Pub. L. No. 105-34, § 1701, 111 Stat. 1099-1103, Congress has still given the President an inconceivably vast slate on which to write or rewrite the tax laws. By appellees' calculation, the power to cancel or not cancel each of 79 provisions would enable the President to edit the TRA into 604,462,909,807,314,587,353,088 (two to the 79th power) different laws, only one of which was enacted by Congress. Appellants' assertion (Br. 38) that the LIV Act merely establishes a new "default rule," and

cancel its provisions. But "awareness" is not the equivalent of passage. Congress could not enact a law authorizing the Senate to delete provisions of House-passed bills and send truncated versions to the President, even though the House would be "aware" of this prospect when it later passed bills.

that Congress has in effect consented in advance to each of the truncated versions that might survive the President's cancellation power, ignores the fact that Congress has never actually considered or passed any of those bills and is belied by this arithmetic. Amicus Senate's assertion that "all participants in the lawmaking process agree to precisely the same statutory text" (Sen. Br. 19) is true only if it is meaningful to say that they have "agreed" to six hundred billion trillion texts.

C. The Line Item Veto Act Is an Abdication of Power To Make Laws, Not a Delegation of Discretionary Authority.

The fundamental constitutional point on which this case turns was stated by this Court in *Field v. Clark*, 143 U.S. 649, 692 (1892): "That Congress cannot delegate legislative power to the President is a principle universally recognized as vital to the integrity and maintenance of the system of government ordained by the Constitution." The Court's delegation doctrine rests on that premise. "The fundamental precept of the delegation doctrine is that the lawmaking function belongs to Congress, U.S. Const., Art. I, § 1, and may not be conveyed to another branch or entity." *Loving v. United States*, 116 S. Ct. 1737, 1744 (1996).[33] As *Loving* makes clear, it is the nontransferability of the "lawmaking function," the power to write federal law, that is "fundamental." The delegation doctrine (the rule that congressional delegations of power to the Executive Branch must be bounded by an "intelligible principle," *Mistretta v. United States*, 488 U.S. 361, 372 (1989)) is only an instance of that "fundamental precept."[34] The Act violates the fundamental precept; it does

[33] *See also Panama Refining Co. v. Ryan*, 293 U.S. 388, 421 (1935) ("The Congress manifestly is not permitted to abdicate, or to transfer to others, the essential legislative functions with which it is . . . vested.").

[34] Congress must constrain each grant of executive discretion by "intelligible principles," lest it give the executive what amounts to the power to make the law. But the converse proposition asserted

"convey[] to another branch or entity," specifically, the President, a "lawmaking function [that] belongs to Congress."

Appellants and amicus Senate argue that the Act does not empower the President to make or unmake law at all, but only grants him broad discretion to execute it. Appellants say, for example (Br. 40), that the "President's authority to 'cancel' tax . . . items is, in practical effect, no more and no less than the power . . . to 'decline to implement' specified tax measures." But that is neither the Act's intention nor its effect. Whatever else the Act's title and its mimicry of the veto power may demonstrate, they surely show that what Congress thought it was doing was giving the President a unilateral power to shape the law itself, not merely to implement it. And cancellations under the Act are designed to, and do, permanently alter the rights of private persons with interests in canceled items.[35] *See Chadha*, 462 U.S. at 952 (action that "ha[s] the purpose and effect of altering the legal rights, duties and relations of persons . . . all outside the Legislative Branch" is legislative and must be accomplished using the Article I process).

The present case is a perfect illustration. Section 968 of the TRA added Section 1042(g) to the Internal Revenue Code, altering the legal rights—the tax liability—

by appellants and amicus Senate is not true: a surrender of the lawmaking function is not *saved* by providing intelligible principles. For example, if Congress purported to empower the President to sign and turn into law bills passed by only one House, such power would be unconstitutional no matter what "intelligible principles" Congress prescribed for the use of the power. Here, Congress has purported to empower the President to, in essence, sign cancellation bills passed by neither House.

[35] *See* H.R. Conf. Rep. No. 104-491, at 29 (in different contexts cancellation negates the government's "legal obligation to pay a benefit," "eliminat[es] the increase in food stamp obligations that would otherwise occur," and "foreclose[s] the ability of the Federal Government to enter into an agreement to pay the amount of money provided in the law").

of persons who sell certain stock to eligible farm cooperatives. When the President canceled Section 968, he deleted Section 1042(g) from the Code. He did not merely decline to enforce it. He made a decision that is binding on himself and the Treasury Department, as well as the taxpayer, and that decision is permanent and irrevocable in a way that is a hallmark of legislative action: *Only Congress has the power to change it back*. If a change of circumstances, or a change of Presidents, leads the White House to believe that Section 968 should be law after all, the only thing the President can do is recommend a new statute to Congress.[36]

Appellant and amicus Senate recite a long list of historical examples of presidential discretion. Most of these relate to spending, or how the government manages its own affairs, and have little to do with changes in the

[36] The unconstitutionality of the Act is demonstrated with particular clarity by the "cancellation" of an Internal Revenue Code provision, which as the district court noted (*see* J.S. App. 30a), has no arguable historical analog. Senate Finance Committee Chairman Roth, a supporter of the LIV Act, made a similar point during floor debate: "My concern with this legislation is that I have never heard of impounding a tax cut." 142 Cong. Rec. S2968 (daily ed. Mar. 27, 1996). But the Act's application to spending measures is equally an abdication of legislative power.

Appellants (Gov. Br. 47-48) and amicus Senate (Sen. Br. 20-21) suggest that cancellation of tax measures poses no special problems, relying on the Court's statement that "the delegation of discretionary authority under Congress' taxing power is subject to no constitutional scrutiny greater than that we have applied to other nondelegation challenges." *Skinner v. Mid-America Pipeline Co.*, 490 U.S. 212, 223 (1989). Appellees agree that tax measures are not unique: in *no* substantive field, taxation or otherwise, may Congress transfer its lawmaking function to the President. *Skinner* itself is not relevant to this case; it involved an extremely narrow delegation of authority to the Department of Transportation to adopt a schedule of regulatory fees. In the language quoted above, the Court was merely noting that the constitutionality of this delegation did not depend on whether the pipeline fees could be classified as "taxes."

Internal Revenue Code that alter the rights of private persons. Appellees agree with, and will not repeat, the analysis of these examples in the brief of appellees City of New York, *et al.* Amicus Senate, however, claims that Congress has also "long delegated authority to impose taxes," citing seven tariff statutes that empowered the President to suspend or reinstate tariffs, or raise or lower them, based on his findings of statutorily specified facts relating to foreign commerce. Sen. Br. 6-7 & nn.5-6. This Court discussed all of these examples in two cases, *J.W. Hampton, Jr. & Co. v. United States*, 276 U.S. 394 (1928), and *Field v. Clark*, 143 U.S. 649 (1892), and the Court's prior treatment of these examples strongly reinforces appellees' position in this case.

The Senate's first five examples—the Acts of March 3, 1815, ch. 77, 3 Stat. 224; May 31, 1830, ch. 219, § 2, 4 Stat. 425; January 7, 1824, ch. 4, § 4, 4 Stat. 2; and May 24, 1828, ch. 111, 4 Stat. 308; and the McKinley Tariff Act of 1890, ch. 1244, § 3, 26 Stat. 567, 612—all come from *Field v. Clark*, 143 U.S. at 685-94. All of these statutes were reciprocal tariff laws. In each, Congress either (a) imposed a tariff on imports and authorized the President to suspend it for a given country if he found that the country had similarly lifted duties on United States exports, or (b) repealed a tariff but made the repeal effective with respect to any given country only when the country lifted its duties on goods from the United States, again as certified by the President. In other words, Congress itself imposed or repealed the tariff in each of these cases; it simply made its action effective—country by country—under specified factual circumstances and left it to the President to make the necessary findings. The *Field* Court made the very point that is critical here: the President's role under all these statutes was to be the "mere agent of the law-making department to ascertain and declare the event upon which its expressed will was to take

effect." *Field*, 143 U.S. at 693,[37] The Court specifically held that this limited arrangement did not "invest the President with the power of legislation," which would have been impermissible. *Id.* at 692.

The two remaining tariff examples—the Acts of August 5, 1909, ch. 6, § 2, 36 Stat. 11, 82-83, and September 21, 1922, ch. 356, § 315(a), 42 Stat. 858, 941-42—come from *J.W. Hampton*, 276 U.S. at 400, 411-12. Both statutes provided for flexible tariffs: Congress set down general rules and authorized the President to make periodic modifications in light of changed circumstances in order to give the statutory policy its intended effect. The 1909 Act prescribed a two-part tariff: a base schedule plus a twenty-five percent surcharge. Both charges presumptively applied, but if the President made a specific finding that a country did not impose unfair barriers to imports from the United States, only the base schedule would apply. Act of August 5, 1909, 36 Stat. at 82-83. Similarly, the 1922 Act, the statute actually at issue in *J.W. Hampton*, set a base tariff schedule aimed at offsetting differences in the costs of producing various goods here and abroad and authorized the President to adjust the schedule periodically if he found such an adjustment was needed to attain cost parity. Act of September 21, 1922, 42 Stat. at 941-42. Again this Court's point was that in these Acts Congress had called on the Executive only to find the facts necessary to apply a duly enacted statute to particular cases: "Congress seems [in enacting the 1922 Act] to have doubted that the information in its possession was such as to enable it to make the adjustment [for production cost differences] accurately, and also to have apprehended that with changing conditions the difference might vary in such a way that some readjust-

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[37] *See also The Brig Aurora v. United States*, 11 U.S. (7 Cranch) 382 (1813) (allowing Congress to reimpose an earlier statute's restrictions on British shipping, but make reimposition contingent on the President's finding of specific factual conditions).

ments would be necessary to give effect to the principle on which the statute proceeds." 276 U.S. at 404-05; *see also id.* at 407.[38]

These tariff statutes, drawing on the President's ability to find facts and apply the law to them, are altogether different from the LIV Act, which authorizes the President to cancel tax laws he decides should not be the law of the land, immediately after Congress has passed them.[39] The LIV Act does not authorize the President to fill in gaps (even major gaps) in a statutory scheme adopted by Congress. It does not instruct him to adapt the operation of the law to the facts as he finds them, or to alter or terminate the operation of the law if he finds that specified facts have occurred or changed. Nor does it allow him continuing discretion to tailor the execution of the law in light of experience. It gives him a one-time power to strike provisions out of the Internal Revenue Code because he

[38] Amicus Senate also cites the Rules Enabling Acts, 28 U.S.C. § 2072(b) (1994); 18 U.S.C. § 3771 (repealed) ("REAs"), which empower this Court to prescribe rules of procedure for the lower federal courts and provide that such rules supersede prior conflicting laws. Sen. Br. 24. In the REAs, Congress decided to assure that all former rules of practice, procedure, and evidence for the federal courts would be replaced by the new uniform system that this Court would promulgate. But the REAs have no bearing on the question whether the LIV Act unconstitutionally expands the President's power under Article I or merely delegates executive authority under Article II. The REAs concern the very different relationship between Congress and this Court in writing rules for lower federal courts established under Article III, and, in any event the constitutional questions presented by the REAs have never been adjudicated.

[39] There are also other pertinent differences between import tariffs and domestic tax statutes. The President has special constitutional responsibilities for foreign affairs and hence special expertise in matters involving international trade. The Court noted this point in *Field v. Clark*: "[I]t is often desirable, if not essential . . . to invest the President with large discretion in matters arising out of the execution of statutes relating to trade and commerce with other nations." 143 U.S. at 691.

alone deems them not to be in the best interests of the nation.

D. Even if the Line Item Veto Act Were Viewed as a Delegation of Executive Authority, It Would Be Invalid.

Even if the Act could properly be viewed as a delegation of executive power and thus tested against the requirement of an "intelligible principle," it would fail: the Act contains no such principle precisely because the intention was to treat the President like a lawmaker. "Executive action is always subject to check by the terms of the legislation that authorized it; and if that authority is exceeded it is open to judicial review . . . ." *Chadha*, 462 U.S. at 953 n.16. By contrast, the Members of Congress (and the President himself when he is acting in his limited Article I role) are not subject to any constraint other than the Constitution and their own best judgments of the nation's interests. The Act makes no serious pretense of providing any "check," because it does not intend to grant any sort of discretionary executive power under Article II but rather to give the President a new role in the lawmaking process under Article I.

The Act requires the President to make three determinations, 2 U.S.C. § 691(a)(A), but none of them is any sort of meaningful "check." The first, that the cancellation of the tax benefit will "reduce the Federal budget deficit," is tautologically true whenever there is such a deficit, a condition the 104th Congress assumed would prevail for the foreseeable future, *see* H.R. Rep. No. 104-11 pt. 1, at 4; *id.* pt. 2, at 7; H.R. Conf. Rep. No 104-491, at 15. The second and third, that the cancellation will "not impair any essential Government functions" and not "harm the national interest," tell the President only that he should not do anything he considers seriously harmful. These provisions are phrased in the negative: they give the President no affirmative guidance whatever as to which items

to cancel.[40] And even as negative instructions they are all but content-free; they provide no basis for anyone other than the President to judge whether an item should be vetoed, or for the judicial review that *Chadha* describes as normally concomitant to executive action.

Appellants and amicus Senate struggle to find other features of the LIV Act that they can claim are constraints on the President's cancellation power. All the features they identify, however, are procedural requirements that were not intended to and do not constrain the President's substantive judgment in any way. Thus, they cite, Sen. Br. 26, the limitation of the power of cancellation to the five days after enactment, but the obvious purpose of that limitation was to tie the cancellation to enactment, in imitation of an item-veto power. They cite, Gov. Br. 47, the requirement that the President "consider" the legislative history and purposes of the statute he is evaluating, the sources of information referenced therein, and the definitions contained in the LIV Act, but this requirement appears to relate only to the President's determination of what is an "item" subject to cancellation; it certainly does not give the President any substantive guidance (or subject him to any constraint or to judicial review) in deciding whether to cancel those cancelable items he has identified.

Finally, appellants cite, Gov. Br. 47, the requirement that the President articulate the reasons for his cancellations, but that requirement only mimics the constitutional provision that when the President "returns" a bill he shall do so "with his Objections." U.S. Const. art. I, § 7, cl. 2. Appellants assert that this requirement of explanation

[40] For the same reason, appellants' observation that Congress made the classes of items subject to cancellation smaller than it could have, Gov. Br. 47; *see also* Sen. Br. 27, is irrelevant to the question whether Congress provided the President with meaningful guidance as to how to chose among the items in the classes it established.

"provides an additional safeguard against arbitrary action," Br. 47 (citing *Motor Vehicle Manufacturers Ass'n v. State Farm Mutual Auto Insurance Co.*, 463 U.S. 29, 43 (1983)), but *State Farm* further illustrates the difference between executive action and a presidential item-veto or repeal. General principles of law barred the executive agency in *State Farm* from acting arbitrarily, and judicial review was available to enforce the bar. In this case, by contrast, defendant cannot explain how a presidential cancellation could possibly *be* "arbitrary," because the word has no meaning in this context: the whole idea is to allow the President to make, at the time he signs a tax bill, whatever choices he alone deems wise or expedient, *i.e.*, to act like a President wielding a veto pen.

This Court's delegation cases, cited by appellants at Br. 44-46, generally involved delegations to the President and to administrative agencies to "fill up the details" of general provisions of law.[41] When the details to be filled up in legislation are dependent on facts, it is particularly

[41] *See, e.g., Loving v. United States*, 116 S. Ct. 1737 (1996); *Touby v. United States*, 500 U.S. 160 (1991); *Skinner v. Mid-America Pipeline Co.*, 490 U.S. 212 (1989); *Mistretta v. United States*, 488 U.S. 361 (1989); *FEA v. Algonquin SNG, Inc.*, 426 U.S. 548 (1976); *Lichter v. United States*, 334 U.S. 742 (1948); *American Power & Light Co. v. SEC*, 329 U.S. 90 (1946); *Yakus v. United States*, 321 U.S. 414 (1944); *NBC v. United States*, 319 U.S. 190 (1943); *New York Cent. Secs. Corp. v. United States*, 287 U.S. 12 (1932). An arguable exception to this pattern is *Opp Cotton Mills v. Administrator of Wage and Hour Div.*, 312 U.S. 126 (1941), which has been described as "[t]he only case in which the power of an administrative official to modify a rule enacted by Congress relating to domestic affairs has been sustained." *The Constitution of the United States of America: Analysis and Interpretation*, Senate Doc. No. 99-16, 82 (1987). But *Opp Cotton Mills* is best understood as a "fill up the gaps" case. In the Fair Labor Standards Act, Congress established a general minimum wage but delegated to an agency the authority to increase the minimum in particular industries if it made specified findings after notice and comment proceedings. Congress thus merely authorized the agency to fill in the minimum wage amounts in accordance with specified instructions, while providing a general, interim baseline itself.

appropriate to call on the Executive, which can bring to bear both expertise and flexibility.[42] To be sure, the gaps to be filled are sometimes wide, as in the statute giving the FCC the power to grant radio licenses "if public convenience, interest, or necessity will be served thereby." 47 U.S.C. § 307(a); *see NBC v. United States*, 319 U.S. 190, 215-16 (1943). But even such delegations are constrained by the historical context and policies of the substantive statute, and do not permit the delegate to overrule or to cancel what Congress has specifically prescribed. *See Mistretta v. United States*, 488 U.S. 361, 374-77 (1989) (describing "overarching constraints" on Sentencing Commission). If the delegation doctrine imposes any continuing limits on congressional transfer of power to the President, they have been exceeded here.

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[42] *See, e.g., Touby*, 500 U.S. 160 (Attorney General temporarily scheduled controlled substances on specified factual finding); *Lichter*, 334 U.S. 742 (in wartime, administrative officials renegotiated defense contracts on finding that profits were excessive); *Yakus*, 321 U.S. 414 (in wartime, Executive set price ceilings after making a series of highly factual determinations); *FPC v. Hope Natural Gas Co.*, 320 U.S. 591 (1944) (agency may set power rates after fact-finding).

CONCLUSION

The Court should affirm the judgment of the district court.

Respectfully submitted,

DONALD B. HOLBROOK
RANDON W. WILSON
WILLIAM H. ORTON
ANDREW H. STONE
JONES, WALDO, HOLBROOK & McDONOUGH
170 South Main Street
Salt Lake, UT 84101
(801) 534-7283

LLOYD N. CUTLER
LOUIS R. COHEN
Counsel of Record
LAWRENCE A. KASTEN
JONATHAN J. FRANKEL
PAUL R. ECKERT
MATTHEW A. BRILL
WILMER, CUTLER & PICKERING
2445 M Street, N.W.
Washington, D.C. 20037
(202) 663-6000

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Supreme Court of the United States

October Term, 1997

WILLIAM J. CLINTON, *et al.*,

Appellants,

vs.

CITY OF NEW YORK, *et al.*,

Appellees.

ROBERT E. RUBIN,

Appellant,

vs.

SNAKE RIVER POTATO GROWERS, INC., *et al.*,

Appellees.

On Appeal from the United States District Court for the District of Columbia

BRIEF FOR APPELLEES CITY OF NEW YORK, *et al.*

CHARLES J. COOPER
DAVID H. THOMPSON
COOPER, CARVIN & ROSENTHAL, PLLC
2000 K Street, N.W.
Suite 401
Washington, D.C. 20006
(202) 822-8950

M. SEAN LAANE
ARNOLD & PORTER
555 12th Street, N.W.
Washington, D.C. 20004
(202) 942-5000

MICHAEL D. HESS
Corporation Counsel of the City of New York

LEONARD J. KOERNER*
Chief Assistant Corporation Counsel
ALAN G. KRAMS
DAVID B. GOLDIN
Assistant Corporation Counsels
New York City Law Department
100 Church Street
New York, New York 10007
(212) 788-1010

* *Counsel of Record*

(*Continued*)

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RICHARD FERRERI
General Counsel
District 37, American Federation of State, County & Municipal Employees
125 Barclay Street
New York, New York 10007
(212) 815-1450

PETER F. NADEL
ROSENMAN & COLIN, LLP
575 Madison Avenue
New York, New York 10022
(212) 940-7010

BASIL PATTERSON
MEYER, SUOZZI, ENGLISH & KLEIN, P.C.
Counsel for Local 1199, National Health and Human Service Employees Union
1505 Kellum Place
Mineola, New York 11501
(516) 741-6565

Attorneys for Appellees City of New York, et al.

RULE 29.6 STATEMENT

There are no changes to the Rule 29.6 Statement in Appellees' Memorandum in Response to Jurisdictional Statement.

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JURISDICTION

The district court had jurisdiction under 2 U.S.C. § 692(a) (Supp. II 1996) and 28 U.S.C. § 1331. The opinion and order of the district court were entered on February 12, 1998. J.S. App. 1a-33a. A notice of appeal was filed on February 13, 1998. J.S. App. 34a-35a. This Court noted jurisdiction on February 27, 1998. This Court has jurisdiction under 2 U.S.C. § 692(b) (Supp. II 1996).

STATEMENT

1. These consolidated cases bring the question of the constitutionality of the Line Item Veto Act before this Court for a second time. Last Term the Court reviewed a decision upholding a facial constitutional challenge to the Act, *Byrd v. Raines*, 956 F. Supp. 25 (D.D.C. 1997), but the Court did not reach the issue because the plaintiffs in that case — current and former Members of the Senate and House of Representatives — were held to lack standing. *Raines v. Byrd*, 117 S. Ct. 2312 (1997). Appellees in this case challenge a specific exercise of the President's power under the Act to "cancel" certain duly enacted federal laws. Specifically, Appellees contend that the President's cancellation of section 4722(c) of the Balanced Budget Act violated Article I of the Constitution and principles of separation of powers.

2. The relevant features of the Line Item Veto Act are accurately and thoroughly described in this Court's decision in *Raines*, 117 S. Ct. at 2315-16, as well as in the briefs filed by Appellants, Br. for Applts. at 5-7, and by Appellees in the companion *Snake River* case at 3-5. We will not unnecessarily repeat those discussions here.

3a. The medical assistance program ("Medicaid") authorized by Title XIX of the Social Security Act is the major vehicle by which the federal government furnishes financial aid to help states and localities provide medical care to the indigent, paying each state between 50 and 83 percent of its covered medical expenses. *See generally* 42 U.S.C.A. § 1396d(b) (Supp. Pamph. 1998).

In 1991 Congress passed legislation requiring that federal matching funds, called Federal Financial Participation ("FFP"), be

reduced by an amount equal to the federal share of money that states collect from taxes on health care providers, unless those taxes meet certain criteria. Medicaid Voluntary Contribution and Provider Specific Tax Amendments of 1991, Pub. L. No. 102-234, § 2(a), 105 Stat. 1793, 1793 (codified as amended at 42 U.S.C.A. § 1396b(w) (Supp. Pamph. 1998)). Among other requirements in the 1991 statute, a provider tax must be "broad-based, in that it applies to all providers within a permissible class of items or services." J.A. 37; *see* 42 U.S.C.A. § 1396b(w)(3)(B) (Supp. Pamph. 1998). Additionally, it must be uniform. *See id.* § 1396b(w)(3)(B)(iii). These requirements can be waived by the Department of Health and Human Services ("HHS") if it concludes that a tax meets other statutory criteria. *See* 42 U.S.C. § 1396b(w)(3)(E).

In December 1994, HHS sent New York State a letter listing fifteen taxes that HHS said "do not meet the broad based and/or uniformity requirements" of Federal law. J.A. 56.[1] HHS advised New York to submit a waiver application within thirty days. J.A. 51. An accompanying "Fact Sheet" said that these fifteen taxes placed $955 million of FFP in jeopardy through June 30, 1994. J.A. 59, 62.

In the ensuing years, New York "submitted more than 1200 pages of waiver requests representing over 60 separate submissions for more than 20 different tax programs," but HHS never formally acted on these applications. J.A. 104. At the time of the President's veto, New York estimated potential FFP losses at $2.6 billion. J.A. 105-06. Under New York law, if HHS finds that the provider taxes listed in its October 1994 letter do not qualify for FFP, providers would be automatically liable retroactively for payment of additional taxes, which the New York State Commissioner of Health is directed to collect with interest and penalties if payment is not made within ninety days. J.A. 27-28, 45.[2]

1. Throughout this brief, references to "New York" will mean the State. Appellee New York City will be referred to as such.

2. *See, e.g.*, N.Y. Pub. Health Law §§ 2807-c(18)(e) (increased (Cont'd)

Appellee New York City Health and Hospitals Corporation ("NYCHHC") operates a large municipal hospital system that is the major provider of medical care to indigent patients in New York City. J.A. 42-43. Approximately 60 percent of NYCHHC's patient care-days are furnished to Medicaid recipients, J.A. 42, and loss of FFP for just one of the impermissible provider taxes would cost NYCHHC an estimated $4 million per year for the years 1993-96. J.A. 27-29, 45. Appellee Jamaica Hospital, a private hospital with 40 percent of its patient care-days in 1995 attributable to medicaid patients, J.A. 43, would lose $10 million for the years 1993-96 from liability on just two of the provider taxes HHS says are unlawful. J.A. 27-29, 45.

Appellee Greater New York Hospital Association ("GNYHA") includes NYCHHC and Jamaica Hospital as members, along with many other hospitals and nursing homes that would experience financial losses akin to those of the Appellee hospitals if HHS reduces New York's FFP. J.A. 29.

Appellee City of New York is a local social services district in the State of New York. *See* N.Y. Soc. Serv. Law § 56. Federal Medicaid legislation allows states participating in the Medicaid program to share with localities those expenses that are not reimbursed by the federal government. 42 U.S.C. § 1396a(a)(2). New York State does so, sharing most unreimbursed expenses equally with local social services districts. *See generally* N.Y. Soc. Serv. Law § 368-a(1)(d). The New York State Department of Health, the state agency that administers Medicaid in New York,

(Cont'd)
retroactive assessments for statewide hospital charity care pool on certain hospital revenues and hospitals); 2807-c(21)(g) (retroactive disallowance of certain charity care distributions); 2807-d(12) (gross receipts tax applied retroactively to excluded revenues, nursing homes, and hospitals); 2807-j(11) (charity care surcharge applied retroactively to Medicare and other hospital revenues); 2807-s(8) (professional education pool tax retroactively applied to excluded hospital revenues); 2807-j(12), 2807-k(15); 2807-l(3); 2807-s(9) (specifying hospital revenues that would be retroactively assessed).

see N.Y. Soc. Serv. Law § 363-a(1), has said that any reduction of FFP by HHS would, pursuant to state law, "be shared between the state, the localities and health care providers, all of whom will experience losses." J.A. 107.

b. In the Balanced Budget Act of 1997, Congress prevented HHS from reducing FFP for New York by declaring that those "taxes, fees, or assessments" collected from health care providers before June 1, 1997, for which New York had sought or would need to seek a waiver from HHS, "are deemed to be permissible health care related taxes and in compliance with" Medicaid requirements. Balanced Budget Act of 1997, Pub. L. No. 105-33, § 4722(c), 1997 U.S.C.C.A.N. [111 Stat.] 251, 515; J.S. App. 72a. The President signed the Balanced Budget Act into law on August 5, 1997, and the pending waiver applications were, in effect, approved statutorily.

4. On August 11, 1997, the President cancelled section 4722(c), relying on the Line Item Veto Act, 2 U.S.C. § 691 (Supp. II 1996), for his authority. J.S. App. 61a-65a. The President labeled section 4722(c) as "new direct spending," J.S. App. 63a, which is defined as "any specific provision of law that is estimated to result in an increase in budget authority or outlays for direct spending." 2 U.S.C. § 691e(8) (Supp. II 1996). The President's cancellation message said New York was "relying upon impermissible provider taxes to finance its Medicaid program." J.S. App. 64a. As required by the Line Item Veto Act, 2 U.S.C. § 691(a)(A)(i) (Supp. II 1996), the President certified that his cancellation "will reduce the Federal budget deficit." J.S. App. 63a. Federal savings were estimated at $200 million in FY 1998. J.S. App. 65a.

At a White House press briefing later that day, Appellant Raines, Director of the Office of Management and Budget (OMB), said that section 4722(c) gave New York relief for provider taxes "that had been determined by HHS to be illegal under a 1991 statute." J.A. 68. Returning to the subject later, Mr. Raines said "[e]veryone knows that we found these [New York provider taxes] to be unlawful." J.A. 73. He said that the cancellation would save the Federal government an estimated $200 million, J.A. 72, and

declared that it would be "bad policy" to allow New York to receive FFP from those taxes. J.A. 82.

In October 1997, HHS wrote to all state Medicaid directors informing them of a clarification of its regulation regarding whether a provider tax is uniform and reiterating that it would "continue to apply the current provider tax laws." J.A. 92.[3] The letter indicated a willingness "to work with States to resolve impermissible tax liabilities," J.A. 92, which, in HHS's view, could best be done with new legislation. J.A. 92-93.

As HHS has pointed out, it has not yet withdrawn FFP and has not issued a formal ruling on New York's waiver applications. J.A. 39. However, in its October 1997 letter, HHS said, absent adoption of new laws by August 1998, it "will move forward to complete the process already begun to apply with full force the current law." J.A. 93.

5. Appellees commenced this action in October 1997, seeking a declaration that the Line Item Veto Act is unconstitutional and that section 4722(c) remains a valid law. J.A. 31. The district court's jurisdiction was invoked based on its general jurisdiction over federal questions, 28 U.S.C. § 1331, and the Line Item Veto Act's expedited review provisions, 2 U.S.C. § 692(a)(1). J.A. 12. This action was consolidated "for all purposes" with *Snake River Potato Growers, Inc. v. Rubin*, which challenges the President's cancellation of another duly enacted law. J.A. 2, 7.

Appellants moved to dismiss for lack of subject matter jurisdiction, J.A. 3, asserting that Appellees lack standing to bring this action, and all parties moved for summary judgment on the merits. J.A. 3-4. Appellees were granted summary judgment, and the Line Item Veto Act was declared unconstitutional. J.S. App. 32a.

The district court found that Appellees had standing to sue because they "suffered an immediate, concrete injury the moment

3. According to Appellee GNYHA, the clarification reduces New York's "$2.6 billion FFP liability by about $700 million." J.A. 47.

that the President used the Line Item Veto to cancel section 4722(c) and deprived them of the benefits of that law." J.S. App. 13a. Focusing solely on the standing of the health care providers, *id.* at 13a n.8, the court said that section 4722(c) "exonerated" these providers of "their burden" to pay additional sums to New York if FFP were reduced. *Id.* The court said:

> When the President cancelled section 4722(c), [Appellees] were divested of the benefit conferred upon them by the legislation. In the simplest terms, [Appellees] had a benefit, and the President took that benefit away. That is injury.

Id. at 13a.

The district court rejected Appellants' argument that the potential for receipt of waivers from HHS deprived Appellees of standing, explaining that Appellees had two available methods of obtaining relief, one being through legislation, *id.* at 13a-14a, an avenue where Appellees achieved "complete success." *Id.* at 14a. Injury occurred when that result was "obliterated" by the President's action. *Id.*

The district court also found it "reasonabl[y] certain[ ]" that Appellees "will be liable for millions of dollars now that section 4722(c) has been canceled," citing HHS's October 1997 letter, the President's certification that his cancellation of section 4722(c) would reduce federal expenditures, and Appellant Raines' remarks to the press as showing "that it is more likely than not," *id.* at 15a, that New York would lose FFP, triggering payments from the Appellee providers to comply with the "automatic liabilities" imposed by New York law. *Id.* at 14a-15a.

On the merits, the district court held that the Line Item Veto Act violated both the procedural requirements of Article I, Section 7 of the Constitution and the doctrine of separation of powers. Noting that "[u]nilateral action by any single participant in the law-making process is precisely what the Bicameralism and Presentment Clauses were designed to prevent," J.S. App. at 25a, the district court held that

> when the President canceled [section 4722(c)] pursuant to his Line Item Veto authority, he unilaterally repealed duly enacted provisions and amended duly enacted laws, which Article I does not permit him to do.

Id. at 26a. The district court also found that Congress openly designed the Act to evade "Article I's requirement that the president sign or return bills *in toto*." *Id.* Given that the Constitution would prohibit Congress from conferring on the President a true line item veto power, the district court held that Congress' attempt to accomplish indirectly the same thing through the Act was also unconstitutional.

Finally, the district court held that the Act, by "authoriz[ing] the President to permanently extinguish laws," unconstitutionally conferred lawmaking power on the President. *Id.* at 30a.

> The Line Item Veto Act impermissibly crosses the line between acceptable delegations of rulemaking authority and unauthorized surrender to the President of an inherently legislative function, namely, the authority to permanently shape laws and package legislation.

Id. at 29a. Accordingly, the district court concluded that the Act violates the separation of powers.

SUMMARY OF ARGUMENT

1. This Court's jurisdiction has been properly invoked. Congress included special judicial review provisions in the Line Item Veto Act to assure that this Court would make a speedy definitive ruling on the Act's constitutionality. Congress' authorization of expedited review for suits brought by "any individual," rather than "any person," was not intended to limit expedited review only to suits brought by natural persons.

Appellees also have standing to sue. Since health care providers face massive financial liability if HHS withdraws FFP from New York because of the state's provider taxes, they are injured for purposes of Article III by the President's unconstitutional cancellation of a legislative provision declaring the taxes proper

and preventing HHS from withdrawing that FFP. This injury arises from the loss of a concrete legal protection that resolved an ongoing dispute in Appellees' favor and took the decision out of HHS's hands. It does not depend on the probability of HHS ultimately reducing New York's Medicaid funding.

Injury is also shown by the realistic danger that, without section 4722(c), HHS will withdraw FFP from New York. HHS has already said that the provider taxes violate Medicaid requirements, and the President called them "impermissible" when he cancelled section 4722(c). Though Appellants maintain that HHS might grant a waiver that would eliminate the risk of injury to Appellees, Appellants' own statements make it apparent that this is not likely. When the President cancelled section 4722(c), he certified, as required by the Line Item Veto Act, that his action would reduce the federal budget deficit. This certification necessarily implies that HHS will not use waivers to authorize expenditure of the money the President said he was saving by cancelling section 4722(c). Post-cancellation statements from the President's Budget Director also make it plain that the waivers will be denied.

Appellees' injury is fairly traceable to the cancellation of section 4722(c) even though Appellees' financial liability if FFP is withdrawn is imposed by state law. The injury facing Appellees is not a conjectural consequence that depends on speculative future conduct, but one that befalls them automatically by operation of law. Under this Court's precedents, the inevitability of this consequence and the fact that the cancellation of section 4722(c) is a "but for" cause of the injury creates a sufficient nexus between the injury and the challenged action to satisfy standing requirements. Of course, the injury will be redressed by a judgment favorable to Appellees.

2. The Line Item Veto Act confers upon the President unilateral power to "cancel" duly enacted spending and tax provisions within five days after their enactment. Cancellation of a spending or tax provision *extinguishes* the law itself; it can be restored to the status of federal law only if it is reenacted by Congress in accordance with the requirements of Article I of the Constitution. And in

exercising his cancellation power under the Act, the President is guided by no standard other than whether he favors the law at issue. The Act constrains *when* he may exercise his cancellation power, but it does not constrain *why* he may exercise it. The Act thus confers upon the President a discretionary power to repeal federal law. It is therefore unconstitutional, for the repeal of a federal law, no less than its enactment, must comply with Article I's "single, finely wrought and exhaustively considered procedure," specifically, bicameral passage and presentment to the President. *INS v. Chadha*, 462 U.S. 919, 951 (1983). The President's cancellation of section 4722(c) of the Balanced Budget Act is accordingly void.

At the center of Appellants' constitutional defense of the Act are this Court's decisions in cases, such as *Field v. Clark*, 143 U.S. 649 (1892), upholding statutory provisions granting the President authority to declare certain tariff acts and similar measures "repealed" and "inoperative." But these cases, as the district court below correctly concluded, merely uphold the congressional practice of "legislating in the contingency," where Congress exercises its Article I power to prescribe the conditions under which a law will cease to exist or be operative, and the President exercises his Article II powers to determine whether the prescribed conditions are satisfied and to implement the will of Congress accordingly. In cancelling a spending or tax provision under the Act, however, the President exercises his own will, not Congress'.

Nor can the President's discretionary power to cancel a spending provision be legitimately likened to his discretionary authority not to spend certain federal funds under a so-called "lump sum" appropriation measure. An exercise of spending discretion does not disturb, let alone extinguish, the underlying appropriation law. The President (or his successor) retains discretion to reverse a prior decision until the appropriation law expires, or is repealed in accord with Article I. The President's cancellation discretion, in contrast, operates directly on the law authorizing the spending, extinguishing it permanently. And while this Court's cases make clear that Congress may delegate to the President sweeping discretionary authority to *implement* federal law, particularly

spending statutes, Congress may not delegate any discretionary authority to extinguish it.

ARGUMENT

I. THIS CASE IS JUSTICIABLE.

A. This Court Has Jurisdiction Over Appellants' Appeal.

In their opening brief on the merits, Appellants argue for the first time in this litigation that the judicial review provisions of the Line Item Veto Act, 2 U.S.C. § 692 (Supp. II 1996), do not apply here because section 692(a)(1) authorizes suits by "individuals," and Appellees are not natural persons. Br. for Applts. at 16-17 & n.5. The argument is flawed in two respects. First, use of the term "individuals" in section 692 was not intended to limit its application only to suits by natural persons. Second, even if section 692 does not apply here, the suit should not be dismissed since it is within the district court's federal question jurisdiction even without resort to the expedited review procedures in the Line Item Veto Act. Only Appellants' appeal to this Court would be improper.

Section 692 was enacted to insure a speedy resolution of the Line Item Veto Act's constitutionality. Its intent should not be undercut by a crabbed reading of the word "individual." *See* 141 Cong. Rec. S4244 (Mar. 21, 1995) (statement of Sen. Simon) ("[w]hat we do not want is to live in limbo. . . . [W]e ought to know as quickly as possible whether it is constitutional"); *accord id.* (statement of Sen. Exon). As initially passed, expedited judicial review was allowed only for suits by Members of Congress. This led to a colloquy two days later between Senators Simon and McCain about amending the bill in conference to allow review by "any person." *Id.* S4476 (Mar. 23, 1995) (statement of Sen. Simon). Their fear was that a member of Congress might not have standing to seek review, thus defeating "[t]he intent of that amendment [which] was to provide a speedy way of removing any cloud" over the enactment. *Id.* To achieve that objective, the standing provision was expanded to permit suits by "individuals." As Appellants note, there is no explanation why the language

ultimately adopted allows review by "any individual," not any "person." Br. for Applts. at 17 n.5.

Given the stated purpose of section 692 and the absence of any evidence that this purpose changed as the amendment proceeded through Congress, Appellants' effort to read great significance into the use of the word "individual" should be rejected. Appellants are correct that the word "individual" ordinarily connotes human beings, not corporations, Br. for Applts. at 17, but that is equally true of the word "person." *See Webster's Third New International Dictionary* 1686 (1986) ("an individual human being"). Just as "person" has been used in legal usage to cover corporate entities and associations, the word "individual" has been similarly construed to implement legislative intent. *See, e.g., National Accounting Co. v. Dorman*, 11 F. Supp. 872, 873 (E.D. Ky.) (three-judge court), *aff'd per curiam*, 295 U.S. 718 (1935); *Rodriguez v. Banco Cent.*, 777 F. Supp. 1043, 1053-54 (D.P.R. 1991), *aff'd on other grounds*, 990 F.2d 7 (1st Cir. 1993). Congress' purpose was to ensure that the constitutionality of this legislation would be authoritatively determined by this Court as quickly as possible, and reading section 692 as allowing expedited review only for suits brought by natural persons would frustrate this purpose.

In any event, there is a natural person among the plaintiffs in the *Snake River Potato Growers* case, and since these two proceedings were consolidated by the district court "for all purposes," J.A. 2, they should be treated as one action. Section 692(b) vests this Court with jurisdiction to review "any order of [the district court] . . . issued pursuant to an action brought under [section 692(a)(1)]." The district court entered a single order granting summary judgment for all plaintiffs in the consolidated case. Mr. Cranney's standing should support this Court's jurisdiction over the entire proceeding. *See Steel Co. v. Citizens for a Better Env't*, 118 S. Ct. 1003, 1014 (1998); *United States Dep't of Labor v. Triplett*, 494 U.S. 715, 719 (1990).

If this Court were to find that section 692 does not apply to this case, it does not follow that the case should be dismissed. To

the contrary, section 692 provides a procedure for expedited judicial review, not the exclusive method for obtaining review. Quite apart from section 692, this case was also brought in the district court as one "arising under the Constitution, laws, or treaties of the United States." 28 U.S.C. § 1331. Nothing in the legislative history suggests that, when Congress enacted section 692, it foreclosed federal jurisdiction of any suit except one brought by members of Congress or natural persons. If section 692 is inapplicable, therefore, the only consequence is that Appellants' appeal to this Court is defeated.

We understand that Appellants have noticed an appeal to the Court of Appeals for the District of Columbia Circuit. It is manifestly senseless, however, for this case to be delayed in its journey to this Court. Accordingly, if Appellants do not promptly file a petition under 28 U.S.C. § 1254 and Rule 11 of this Court's rules for a writ of *certiorari* before judgment, Appellees will. *See* Robert L. Stern, Eugene Gressman, *et al.*, *Supreme Court Practice* 199 (7th ed. 1993) ("The Court has also reviewed cases before judgment below when a similar or identical question of constitutional or other importance was before the Court in another case and where the same case was argued on the merits in connection with a direct appeal from a district court that the Court found to have been erroneously taken.") (footnotes omitted).

B. Appellees Have Standing to Challenge the President's Cancellation of Section 4722(c).

The basic requirements for standing to sue in the federal courts are well-established:

> The "irreducible constitutional minimum of standing" contains three requirements. First and foremost, there must be alleged (and ultimately proven) an "injury in fact" — a harm suffered by the plaintiff that is "concrete" and "actual or imminent, not 'conjectural or hypothetical.' " Second, there must be causation — a fairly traceable connection between the plaintiff's injury and the complained-of conduct of the defendant. And third, there must be redressability — a likelihood that the requested relief will redress the alleged injury. This triad . . . comprises the core of Article III's case-or-controversy requirement. . . .

Steel Co., 118 S. Ct. at 1016-17 (citations and footnote omitted).

1. Appellees Have Suffered Injury in Fact.

The function of the injury-in-fact requirement is to make sure that the plaintiff has

> "alleged such a personal stake in the outcome of the controversy" as to warrant *his* invocation of federal-court jurisdiction and to justify exercise of the court's remedial powers on his behalf.

Warth v. Seldin, 422 U.S. 490, 498-99 (1975) (quoting *Baker v. Carr*, 369 U.S. 186, 204 (1962)). It

> assure[s] that the legal questions presented to the court will be resolved, not in the rarified atmosphere of a debating society, but in a concrete factual context conducive to a realistic appraisal of the consequences of judicial action.

Valley Forge Christian College v. Americans United for Separation of Church & State, Inc., 454 U.S. 466, 472 (1982); *see also United States v. Students Challenging Regulatory Agency Procedures (SCRAP)*, 412 U.S. 669, 689 n.14 (1973) (" 'Injury in fact' . . . serves to distinguish a person with a direct stake in the outcome of a litigation — even though small — from a person with a mere interest in the problem.")

Appellees filed this suit to protect a concrete benefit that was provided by Congress and stripped away by the President when he cancelled section 4722(c). Without more, this deprivation of a legislative benefit — favorable resolution of the provider tax issue without further need to pursue HHS waivers — constituted injury

in fact. The cancellation of what in essence was a "Congressional waiver" injured Appellees by restoring the status quo and reinstating the potential, large or small, of HHS disapproval that existed prior to section 4722(c).

If it is necessary to reach the point, Appellees show below that it is highly probable — indeed, virtually certain — that HHS will not grant the waivers sought. When the President cancelled section 4722(c), his message to Congress called New York's provider taxes "impermissible," and he certified that the federal budget deficit would be reduced an estimated $200 million by his action. J.S. App. 64a. Appellees' realistic danger of future injury is also sufficient to establish standing.[4]

a. Deprivation of the Protection of Section 4722(c) Is Injury Regardless of the Likelihood that HHS Will Withdraw FFP.

Congress resolved an ongoing dispute about New York's provider taxes by enacting section 4722(c). Appellants do not

4. Discussions of Appellees' standing have focused on Appellees NYCHHC and Jamaica Hospital, *see* Dist. Ct. opinion, J.S. App. at 13a n.8; Br. for Applts. at 20 n.6, each of which stands to lose millions of dollars by operation of state law if FFP is withdrawn from New York (*supra* pp. 2-3 and n.2). These providers are just the tip of the iceberg. Appellee GNYHA represents the two appellee-hospitals plus over 170 other providers who will suffer losses. J.A. 28-29. Accordingly, it has standing to press its members' interests. *See Warth*, 422 U.S. at 511. A finding of standing for any single party assures the courts' jurisdiction to reach the merits and eliminates the need to pursue the issue further. *See Triplett*, 494 U.S. at 719. Appellee New York City also has standing because, by operation of state law, it shares with New York State the cost of most Medicaid expenses that are not reimbursed by the federal government, *see* N.Y. Soc. Serv. Law § 368-a(1)(d), and will suffer financial losses if FFP is reduced (*supra* pp. 3-4). Finally, the appellee-unions, representing many workers employed by health care providers, alleged sufficient injury to support their standing because of the job losses that would be likely to accompany imposition of substantial financial penalties on the providers. J.A. 29-30.

dispute that, when the President signed the Balanced Budget Act of 1997, section 4722(c) became law. At that moment, HHS's views regarding New York's provider taxes and HHS's intentions concerning issuance of waivers pursuant to the 1991 Medicaid laws became irrelevant. Congress decided, notwithstanding its prior enactments, that New York's provider taxes could not be the basis for reducing FFP. The President's cancellation of that pre-emptive resolution of the issue was injury, no matter what the likelihood that HHS might ultimately grant New York waivers. As the district court said:

> When the President canceled section 4722(c), [Appellees] were divested of the benefit conferred upon them by the legislation. In the simplest terms, [Appellees] had a benefit, and the President took that benefit away. That is injury.

J.S. App. at 13a.

Even before this Court "greatly expanded the types of 'personal stake[s]' which are capable of conferring standing," *Linda R.S. v. Richard D.*, 410 U.S. 614, 616-17 (1973) (brackets in original), interests protectible in court included those arising from "a statute which confers a privilege." *Tennessee Elec. Power Co. v. Tennessee Valley Auth.*, 306 U.S. 118, 137-38 (1939). "Congress may enact statutes creating legal rights, the invasion of which creates standing, even though no injury would exist without the statute." *Linda R.S.*, 410 U.S. at 617 n.3; *Warth*, 422 U.S. at 500. When such an injury is "concrete and particularized," *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992), *i.e.*, it "affect[s] the plaintiff in a personal and individual way," it constitutes injury in fact. *Id.* at 560 n.1.

Appellants miss the mark when they argue that cancellation of section 4722(c)'s protection of New York's FFP is not injury because Appellees might achieve the same result if HHS decides to grant waivers. Br. for Applts. at 25-26. Standing is not determined solely by focusing on whether there is injury to a plaintiff's final litigation objectives, but on "the specific common-law, statutory or constitutional claims that a party presents." *International Primate*

Protection League v. Administrators of Tulane Educ. Fund, 500 U.S. 72, 77 (1991). In *International Primate*, plaintiffs were found by the court of appeals to lack standing to obtain their ultimate relief — protection of certain monkeys — but this Court nonetheless held that they had standing to challenge the case's removal to federal court because "they have lost their right to sue in the . . . forum of their choice," and that loss constituted injury. *Id.*

In *Thomas v. Union Carbide Agric. Prods. Co.*, 473 U.S. 568 (1985), the plaintiffs challenged as unconstitutional a statute requiring that claims be resolved by binding arbitration, not in a court. This Court did not require the plaintiffs to go through the arbitration to ascertain if the result would injure them financially. It held that "it is sufficient for purposes of a claim under Article III that the claimant demonstrate it has been or inevitably will be subjected to an exercise of unconstitutional jurisdiction." 473 U.S. at 580. The "Article III injury is not a function of [how the arbitrator will rule] but of the tribunal's authority to adjudicate the dispute." *Id.*; *see also Withrow v. Larkin*, 421 U.S. 35 (1975) (addressing on merits physician's claim that impending administrative hearing would deny doctor procedural due process).

Here, HHS's authority over the provider tax issue is dependent on the validity of the President's cancellation of section 4722(c). If Appellees are correct that the cancellation was unconstitutional, HHS has no waiver decisions to make, and Appellees would be injured by HHS's wrongful exercise of authority over an issue resolved by Congress.

The injury in this case is far more concrete and palpable than those found sufficient to support standing in *International Primate* and *Thomas*. Appellees have lost far more than the right to have their dispute resolved in a particular forum. It was resolved. Section 4722(c) gave Appellees precisely what they ultimately wanted: protection from the liability they would incur if New York's FFP is reduced because of the provider taxes. The fact that the same result is theoretically achievable through HHS's processes does not alter the fact that Appellees suffered injury in fact when their existing legal protection was removed. *Cf. Sierra Club v. EPA*,

129 F.3d 137, 139 (D.C. Cir. 1997) ("[e]ven if alternative protective measures might limit the harm caused by the relaxation of regulatory provisions, the existence of alternative 'protective conditions' does not negate a party's standing to enforce statutorily mandated regulations").[5]

It has long been established that

> a plaintiff suffers a constitutionally cognizable injury by the loss of an opportunity to pursue a benefit . . . even though the plaintiff may not be able to show that it was certain to receive that benefit had it been accorded the lost opportunity.

CC Distribs., Inc. v. United States, 883 F.2d 146, 150 (D.C. Cir. 1989) (emphases omitted); *see Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 211 (1995); *Regents of the Univ. of California v. Bakke*, 438 U.S. 265, 280-81 n.14 (1978). Here, Appellees actually lost their benefit, and they lost it as a direct result of the presidential action challenged as unconstitutional.

Though they are not strictly about standing, cases involving the ability to appeal as an aggrieved party are instructive because "aggrievement" for purposes of appeal necessarily carries with it the determination that the litigant "retains a stake in the appeal

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5. The possibility of a waiver is as irrelevant here as was the possibility of alternative relief in *Chadha*, 462 at 936-37. In *Chadha*, this Court held that

> [a] person threatened with deportation cannot be denied the right to challenge the constitutional validity of the process that led to his status merely on the basis of speculation over the availability of other forms of relief.

462 U.S. at 936-37. Appellants' effort to distinguish *Chadha* on the grounds that it involved "final" action is unavailing. Here, HHS has already determined that New York's provider taxes are unlawful; a waiver would not overturn that determination, but would simply provide relief from the threatened consequences of that determination — just as Mr. Chadha had potential avenues for relief from the threatened consequences facing him.

satisfying the requirements of Article III." *Deposit Guar. Nat'l Bank v. Roper*, 445 U.S. 326, 334 (1980); *see also SCRAP*, 412 U.S. at 689 n.14 (" 'Injury in fact' reflects the statutory requirement that a person be 'adversely affected' or 'aggrieved' . . . ."). Appellees' situation is like that of a litigant who is awarded summary judgment, only to see the victory taken away on appeal with a direction for a trial. The once-victorious litigant might prevail again, but having achieved his desired result once, he is undoubtedly aggrieved by having to take his chances at trial and may appeal the determination that he do so. *See, e.g., Consolidated Rail Corp. v. Gottshall*, 512 U.S. 532, 537 (1994).

As the district court correctly explained:

> [Appellees] had two independent avenues that they could have pursued to avoid potential liability: one legislative and one administrative. The legislative approach yielded complete success. The fact that there are two mechanisms that could produce a result does not mean that a party is not injured when one of those mechanisms produces the desired result and then that result is obliterated.

J.S. App. 13a-14a.

In short, the cancellation of section 4722(c) dramatically altered Appellees' legal status from being protected against loss to being once again exposed. This is injury in fact.[6] As to this injury, little need be said about the two other prongs of the test for standing. The direct cause is the cancellation of section 4722(c) pursuant to

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6. Appellants assert that Appellees must identify a concrete instance in which the cancellation caused them to alter their business practices, such as creating a cash reserve to cover their potential liability to New York. Br. for Applts. at 32 n.12. No such requirement exists. The injury flowing from the loss of legislative protection and the reimposition of the risk of financial loss is sufficient to establish standing, without the need to elicit "proof" of *additional* injury, *e.g.*, impairment of the ability "to engage in meaningful planning and borrowing of funds." J.A. 29.

the Line Item Veto Act, and a favorable decision here would redress the injury by restoring the cancelled legislative enactment.

b. The Likelihood that HHS Will Reduce New York's FFP Is Sufficient Risk of Injury to Confer Standing.

If this Court does not consider loss of the statutory protection provided by section 4722(c) to be injury in and of itself, it should find Appellees injured because the cancellation places them at substantial risk of losing millions of dollars because of HHS's threat to reduce FFP in New York's Medicaid Program. This loss need not be an absolute certainty to provide a basis for standing.

"A plaintiff who challenges a statute must demonstrate a realistic danger of sustaining a direct injury as a result of the statute's operation or enforcement." *Babbitt v. United Farm Workers Nat'l Union*, 442 U.S. 289, 298 (1979). The function of this requirement is to ensure that the litigants are involved in an actual controversy and are not litigating an abstract or hypothetical dispute. *See id.*

At the very least, a "realistic danger" of injury confronts Appellees. Appellants' statements when section 4722(c) was cancelled make HHS's future course readily apparent: the waivers will almost certainly be denied. The President cancelled section 4722(c) as "new direct spending," 2 U.S.C. § 691(a)(2) (Supp. II 1996), and he certified, again as required by law, that the cancellation "will . . . reduce the Federal budget deficit." 2 U.S.C. § 691(a)(A) (Supp. II 1996); J.S. App. at 63a. In his explanation, the President said:

> The canceled item would have deemed taxes, fees, or assessments that were collected by the State of New York from a health care provider before June 1, 1997, and for which a waiver has been applied for, to be permissible health care related taxes in compliance with the requirements of Medicaid law. . . . This preferential treatment would have increased Medicaid costs. . . .
>
> * * *
>
> As a result of the cancellation, Federal outlays will not increase, as specified below.

J.S. App. at 64a. Attached to this message was a table with the Government's estimate, subject to revision, that the cancellation reduced federal outlays by $200 million. J.S. App. at 65a.

Appellants now claim that these statements about savings merely reflect the fact that, at the moment of cancellation, the President's action reduced government outlays, on paper, by eliminating the budget authority embodied in section 4722(c); however, Appellants say this assertion is not a harbinger of HHS's ultimate decision on the waiver applications. Br. for Applts. at 22-23 n.9. This reasoning ignores the second prong of the President's certification to Congress. It may explain how section 4722(c) qualifies as "new spending," thus making it subject to cancellation under the Line Item Veto Act, but if the cancellation was not going to lessen actual federal expenditures, the President could hardly comply with the statutory requirement that he assure Congress that his action "will" reduce the deficit. This assurance was possible only if the waiver applications will be denied, and Appellant Raines said at a post-cancellation press conference that New York "will not be able" to collect FFP from the provider taxes. J.A. 68.[7]

In numerous cases, this Court has found injury in fact based on a risk of future injury substantially less than Appellees face here. In *Pennell v. City of San Jose*, 485 U.S. 1 (1988), landlords were held to have standing to challenge a provision in a rent control ordinance requiring reduced rents for tenants in financial distress.

7. Appellants incorrectly characterize as "in no way inconsistent with the future granting of waiver applications," Br. for Applts. at 22, a statement by HHS in an October 1997 letter to State Medicaid directors that, without new federal legislation, HHS would "move forward to complete the process already begun to apply with full force the current law." J.A. 93. The undisputed record shows that this letter was followed by HHS's explanation at meetings with New York officials that New York's waivers would not be resolved absent a global resolution of all states' waiver applications, which could be achieved only via legislation. *See* J.A. 106. The district court did not misread that part of the record in concluding that it reflected a likelihood "that the State of New York will be required to refund at least some of the payments it has received from [HHS]." J.S. App. 15a.

The appellees said the owners did not have standing because the prospect of injury was speculative, but this Court, citing *Babbitt*, ruled that "[t]he likelihood of enforcement, with the concomitant probability that a landlord's rent will be reduced . . . , is a sufficient threat of actual injury" to support standing. 485 U.S. at 8.

In *Blum v. Yaretsky*, 457 U.S. 991 (1982), the issue was whether the plaintiffs had standing to argue that procedural due process requirements apply when private nursing homes decide that it is medically appropriate to transfer a patient to a lower level of care. The plaintiffs had been subjected to government-instigated transfers based on the medical judgment of review committees established to ensure that public health care funds were spent only for needed care, but there had been no threatened transfers by private nursing homes. *See* 457 U.S. at 999-1000. Standing was found because "the threat of facility-initiated discharges or transfers . . . is sufficiently substantial." *Id.* at 1000. The decision observed that the nursing homes were "free to determine" that transfer was appropriate, *id.*, and the threat of such a decision was considered "quite realistic" since "similar determinations" had already been made by the review committees, whose members were selected by the nursing homes. *Id.* at 1001.

In *Village of Arlington Heights v. Metropolitan Hous. Dev. Corp.*, 429 U.S. 252 (1977), a housing developer was allowed to contest a denial of rezoning even though ultimate construction of its project was contingent on "secur[ing] financing, qualify[ing] for federal subsidies," and completing construction. *Id.* at 261. The opinion explained that "undue speculation" about the likelihood of construction was not warranted since there was "a detailed and specific" project at issue. *Id.*; *see also Air Courier Conference of Am. v. American Postal Workers Union*, 498 U.S. 517, 524 (1991) (accepting district court's finding of injury predicated on its determination that "increased competition . . . might have an adverse effect on employment opportunities of postal workers").

In cases like *Blum* and *Babbitt*, it was always possible that the ultimate injury-creating decisions would not be made, but a

plaintiff's burden is to show significant risk of injury, not metaphysical certainty. The risk here is comparable to the risk present in cases where this Court has found standing. This case is not like *Defenders of Wildlife*, where plaintiffs were found not to have standing when they claimed that areas they might want to visit at some unspecified future time were about to be environmentally damaged by wrongful government action. *See* 504 U.S. at 563-64. Nor is it like *Simon v. Eastern Kentucky Welfare Rights Org.*, 426 U.S. 26 (1976), where indigent plaintiffs sought to challenge tax exemptions granted nonprofit hospitals on the "purely speculative" theory that the tax exemptions encouraged the hospitals to limit treatment of indigents. 426 U.S. at 42, 42-43.

Here, Appellees have presented far more than "unadorned speculation." *Id.* at 44. There is a long-standing dispute with HHS about New York's provider taxes. HHS has stated that the taxes do not meet federal standards and, like the doctors in *Blum*, it has tipped its hand regarding the waiver applications.[8]

Appellants turn standing principles on their head when they argue that the possibility of future waivers from HHS minimizes the threat posed by HHS's existing determination that the provider taxes do not comply with Medicaid requirements. To support this argument, Appellants rely heavily on *Anderson v. Green*, 513 U.S. 557 (1995), Br. for Applts. at 20-21, where this Court ruled that a challenge to a California statute capping the amount of public assistance benefits for new state residents was nonjusticiable because, by its terms, the statute would take effect only upon issuance of a

8. Appellants suggested below that HHS had not even made a "final agency decision" as to whether New York's disputed provider taxes violate Medicaid requirements, J.A. at 38, but they do not deny here that they consider the taxes improper. This implicit acknowledgment is understandable given HHS's 1994 letter identifying the taxes as violative of Medicaid standards, the President's reference to the taxes as "impermissible" in his cancellation message, J.S. App. at 64a, and the Budget Director's similar references at the post-cancellation White House press conference (*supra* pp. 4-5).

waiver by HHS, and at the time this Court ruled, a prior waiver had been annulled in another proceeding. *See* 513 U.S. at 559. Critical to that result was

> California['s] acknowledge[ment] that even if it prevails here, the [challenged policy] will not take effect. . . . The parties have no live dispute now, and whether one will arise in the future is conjectural.

Id. (citation omitted). *Anderson* is instructive because it shows that risk of injury should be assessed on the state of affairs in existence now, not at some hypothetical future point. Factually, *Anderson*'s situation is the opposite of the situation here. Resolution of this suit in a manner favorable to Appellees will make a difference by restoring section 4722(c) and eliminating the "realistic" danger that HHS will carry out its oft-repeated threat to withdraw FFP from New York's Medicaid program. *Babbitt*, 442 U.S. at 298.

In *Anderson*, the injury-creating party, California, was prevented from acting by a legal roadblock — the absence of HHS's approval — which might never be removed. Here, there was a legal roadblock protecting Appellees from injury — section 4722(c) — but it was cancelled pursuant to an unconstitutional statute, thus reimposing the threat that HHS will injure Appellees by withdrawing FFP.

The other cases Appellants cite on this issue are readily distinguishable. *Suitum v. Tahoe Regional Planning Agency*, 117 S. Ct. 1659, 1666 (1997); *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1019-20 (1984); and *Hodel v. Virginia Surface Mining & Reclamation Ass'n*, 452 U.S. 264, 297 (1981), Br. for Applts. at 21, all stand for the unexceptionable proposition that "an as-applied [Takings] challenge [is] unripe" if the plaintiff has not utilized an available administrative or judicial process capable of supplying relief, whether by granting a variance from the law's requirements or providing just compensation for any taking. *Suitum*, 117 S. Ct. at 1666; *see Ruckelshaus*, 467 U.S. at 1013 & n.16. The instant case is a facial challenge based on the proposition that the Line Item Veto Act can never be constitutionally applied.

See Anderson v. Edwards, 514 U.S. 143, 155-56 n.6 (1995). Accordingly, the ripeness concerns expressed in *Suitum*, *Ruckelshaus*, and *Hodel* have no bearing here. *See Suitum*, 117 S. Ct. at 1666 n.10; *Yee v. City of Escondido*, 503 U.S. 519, 533-34 (1992). Indeed, in *Ruckelshaus* and *Hodel*, facial challenges were made, and this Court addressed those claims on their merits. *See Ruckelshaus*, 467 U.S. at 1014-16 (whether takings authorized by statute were for a public purpose); *Hodel*, 452 U.S. at 275-305 (whether statute was facially unconstitutional as violative of, *inter alia*, Commerce Clause, Tenth Amendment, and Takings Clause).[9]

Moreover, the ripeness concerns mentioned in *Thomas*, 473 U.S. 568, Br. for Applts. at 21, favor Appellees here. "The issue presented in this case is purely legal, and will not be clarified by further factual development," *id.* at 581, and "the public interest would be well served by a prompt resolution of the constitutionality" of the Line Item Veto Act. *Id.* at 582. Indeed, Congress enacted special judicial review provisions to insure this Court's speedy consideration of the issues raised by this lawsuit, *see* 2 U.S.C. § 692, thus eliminating any claim that prudential considerations of ripeness should lead the courts to defer consideration of the "important dispute" this case raises. *Raines*, 117 S. Ct. at 2318 & n.3; *id.* at 2323 n.1 (Souter, J., concurring).

2. Appellees' Injury Is Fairly Traceable to the President's Use of the Line Item Veto Act and Would Be Redressed by a Favorable Decision in this Case.

Appellees' standing is not undercut by the fact that their financial loss upon reduction of FFP flows from New York statutes. Appellants do not dispute that state law imposes automatic liability on health care providers if HHS recoups FFP because of the provider taxes. Rather, they contend that, since Appellees' loss is not commanded by Federal Medicaid laws, Appellees' injury is not attributable for standing purposes to the President's cancellation of section 4722(c). Br. for Applts. at 23-25.

9. No facial challenge was made in *Suitum*. *See* 117 S. Ct. at 1666 n.10.

This argument "wrongly equates injury 'fairly traceable' to the defendant with injury as to which the defendant's actions are the very last step in the chain of causation." *Bennett v. Spear*, 117 S. Ct. 1154, 1164 (1997). "[C]ollateral consequences" of challenged action satisfy causation requirements for standing so long as their occurrence is not unduly speculative. *Spencer v. Kemna*, 118 S. Ct. 978, 985 (1998).

In cases where the injured plaintiff is not the party directly acted upon by the challenged government action, legally cognizable injury depends on the directly affected party's "response," so the plaintiff must "adduce facts showing that those choices have been or will be made in such manner as to produce causation and permit redressability of injury." *Defenders of Wildlife*, 504 U.S. at 562.[10] Here, the injury-producing choices "have been" made; New York's statutes make Appellees liable for millions of dollars if HHS reduces New York's FFP because of the provider taxes.

In *Duke Power Co. v. Carolina Envtl. Study Group, Inc.*, 438 U.S. 59 (1978), this Court upheld the plaintiff's standing to challenge legislation limiting liability for accidents at nuclear power plants because the district court "discerned a 'but for' causal connection" between the enactment and the construction of additional nuclear power plants. 438 U.S. at 74; *see id.* at 77-78. That same connection is present here.

In *Barlow v. Collins*, 397 U.S. 159 (1970), tenant farmers were allowed to attack an amendment to Department of Agriculture regulations allowing assignment of certain farm subsidy payments to pay rent for the land. The plaintiffs claimed the regulation injured them indirectly because it afforded landowners increased bargaining leverage, allowing the owners to insist on the assignment, depriving the tenants of cash and increasing their dependence on the owners. *See* 397 U.S. at 160-63.[11]

10. Little need be said on the subject of redressability. A ruling that the Line Item Veto Act is unconstitutional and that section 4722(c) is a valid law will eliminate the injury caused by its cancellation, and no party contends otherwise.

11. This Court likewise held that an indirect causal chain supported (Cont'd)

In *Maryland v. Louisiana*, 451 U.S. 725 (1981), Maryland and other states challenged a tax that Louisiana levied on natural gas pipeline companies, a tax the companies "theoretically" could have absorbed themselves. Report of the Special Master 11 (Sept. 15, 1980), *Maryland v. Louisiana*. However, the pipeline companies sought and received approval from the Federal Energy Regulatory Commission to pass the tax on to consumers. *See* 451 U.S. at 737. Maryland claimed injury as a gas consumer, and Louisiana argued that Maryland lacked standing because it was not the party directly liable for the tax. This Court disagreed, finding that the costs borne by the consumers because of the pass-along were causally connected to the challenged tax. 451 U.S. at 736-37; *see also General Motors Corp. v. Tracy*, 117 S. Ct. 811, 818 (1997) (allowing natural gas consumer's Commerce Clause challenge to a tax imposed on certain sellers of natural gas).

Appellants support their causation argument by relying on *Warth*, 422 U.S. 490, Br. for Applts. at 24, but the facts in *Warth* bear little relation to those here. In *Warth*, various plaintiffs complained that Penfield, New York used exclusionary zoning to keep "persons of low and moderate income from living in the town." 422 U.S. at 493. This Court found that the plaintiffs had not shown a causal relationship between the challenged zoning and the plaintiffs' inability to live in Penfield because the plaintiffs

> rel[ied] on little more than the remote possibility, unsubstantiated by allegations of fact, that their situation might have been better had respondents acted otherwise, and might improve were the court to afford relief.

(Cont'd)
standing in *Bryant v. Yellen*, 447 U.S. 352, 366-68 (1980). There, would-be farm purchasers had standing to seek declaratory relief challenging the Government's interpretation of reclamation laws that allegedly reduced the likelihood *third parties* would make land available for purchase at below market prices. This indirect, and probabilistic, traceability was enough to meet the requirements of Article III — "even though [the would-be purchasers] could not with certainty establish that they would be able to purchase excess lands" if declaratory relief were granted. *Id.* at 367.

Id. at 507. Here, speculation is not needed to divine the consequences that will befall Appellees if FFP is withdrawn from New York; the consequences have been enacted into law.[12]

Appellants invite improper speculation when they note that New York has "discretion regarding the appropriate response" if FFP is withdrawn. Br. for Applts. at 23 n.10. The point is of no moment because New York has already acted, adopting laws imposing substantial financial obligations on Appellees. If Appellants' point is that the state's laws are changeable, they are asking this Court to indulge in the very kind of speculation it has repeatedly eschewed. *Cf. Duke Power*, 438 U.S. at 77-78 (commenting on the defendants' argument that, if the challenged statute had not been passed, Congress would have taken other action leading to the same injury — "[n]othing in our prior cases requires a party seeking to invoke federal jurisdiction to negate the kind of speculative and hypothetical possibilities suggested in order to demonstrate the likely effectiveness of judicial relief," *id.* at 78); *Regional Rail Reorganization Act Cases*, 419 U.S. 102, 140 (1974)

12. The two court of appeals cases emphasized by Appellants do not aid their argument. *See* Br. for Applts. at 25 n.11. In *Young v. Klutznick*, 652 F.2d 617 (6th Cir. 1981), *cert. denied*, 455 U.S. 939 (1982), the alleged injury— malapportionment of the Michigan Legislature because of faulty census data — had not occurred, and would not, absent a discretionary decision by the Legislature to use the data without adjusting it. 652 F.2d at 623-24. Here, the consequence to the providers if New York loses FFP has been a matter of state law for years, and there is no need to speculate that "the . . . legislature will act in a particular way." *Id.* at 623. The ruling in *City of Detroit v. Franklin*, 4 F.3d 1367 (6th Cir. 1992), *cert. denied*, 510 U.S. 1176 (1994), that the discretionary decision to use the census data broke the chain of causation, is inapposite because it flows from the fact that the census data could have been adjusted before it was used. 4 F.3d at 1373. In this case, the challenged action — cancellation of section 4722(c) — is a "but for" cause of Appellees' injury. This kind of "but for" relationship was present in *Franklin* on another issue, not discussed by Appellants, and on that point, the court ruled that loss of federal funding was fairly traceable to the challenged census data since existing laws used that data to apportion federal aid for a host of programs. *Id.* at 1374.

(finding sufficient risk of future injury for suit to be ripe — "we must assume there will be compliance with" current law).

Instead of guessing what New York might do, the determination of causation should be based on what New York has done. The legal consequences that would automatically flow from a reduction in New York's FFP mean that the injury caused by the President's cancellation of section 4722(c) — a "but for" cause — is fairly traceable to that cancellation for standing purposes.

Appellees turn now to explaining why the Line Item Veto Act and the President's use of it to cancel section 4722(c) violate the Constitution.

II. THE LINE ITEM VETO ACT IS UNCONSTITUTIONAL AND THE PRESIDENT'S CANCELLATION OF SECTION 4722(c) OF THE BALANCED BUDGET ACT IS VOID.

The Constitution separates the power to make law from the power and duty to execute the law. Article I vests "[a]ll legislative powers" in the Congress. U.S. Const. art. I, § 1. The President's constitutional role is to "take Care that the Laws be faithfully executed." U.S. Const. art. II, § 3. The President has only a qualified check on the lawmaking process: he is empowered under Article I to "return" (veto) a whole bill that has been presented to him, but his veto may be overridden by two-thirds of both Houses of Congress. U.S. Const. art. I, § 7, cl. 2. This separation of legislative and executive power is one of the central foundations of our government. *See, e.g., Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 587 (1952); *Buckley v. Valeo*, 424 U.S. 1, 129 (1976); *Chadha*, 462 U.S. 919; *Bowsher v. Synar*, 478 U.S. 714 (1986).

The core requirements of Article I's "single, finely wrought and exhaustively considered procedure" for the passage of legislation are bicameral passage and presentment to the President. *Chadha*, 462 U.S. at 951. The Act plainly confers upon the President the unilateral power to make law (or, more precisely, to *unmake* law) in violation of the bicameral passage and presentment requirements of Article I.

A. Article I Prescribes the Exclusive Means for Enacting and Repealing Federal Law.

Article I requires, first, that any bill making or changing federal statutory law must be passed by both Houses of Congress in exactly the same form. The Framers "provided[ed] that no law could take effect without the concurrence of the prescribed majority of the Members of both Houses . . . ." *Id.* at 948. Thus, unlike the President, each House of Congress has an unqualified power to block a bill from becoming law.

The "Presentment Clause," Article I, Section 7, Clause 2, requires that every bill passed by both Houses be presented to the President, and it gives him only three choices: he may sign the bill into law, he may return it with his objections, or he may do nothing with it for ten days, after which it becomes law (unless the pocket veto clause applies).[13] As noted earlier, the President has only a qualified blocking power, for his veto may be overridden.[14] The

13. The Presentment Clause, in pertinent part, provides as follows:

> Every Bill which shall have passed the House of Representatives and the Senate shall, before it become a Law, be presented to the President of the United States; If he approve he shall sign it, but if not he shall return it, with his Objections to that House in which it shall have originated, who shall . . . proceed to reconsider it. If after such Reconsideration two-thirds of that House shall agree to pass the Bill, it shall be sent, together with the Objections to the other House, by which it shall likewise be reconsidered, and if approved by two-thirds of that House, it shall become a Law. . . . If any Bill shall not be returned by the President within ten Days (Sundays excepted) after it shall have been presented to him, the Same shall be a Law, in like Manner as if he had signed it, unless the congress by their Adjournment prevent its Return, in which Case it shall not be a Law.

14. The Constitution does not give the President any "legislative Powers" but only "a salutary check upon the legislative body" after both Houses have passed a bill. The Federalist No. 73 (Alexander Hamilton).

language of the Presentment Clause makes clear that the President must either approve the bill or return it in its entirety, exactly as it is presented to him.[15] The *in toto* requirement ensures that the President, like the House and Senate, lacks power to unilaterally revise the work of the other participants in the lawmaking process.

Appellants readily acknowledge that under the Presentment Clause, "the President is required to sign or return a presented bill *in toto;* he is not empowered to sign some portions of the bill and return others." Br. for Applts. at 34. The sole purpose of the Act, as its title frankly proclaims, is to evade this constitutional constraint, and Appellants have previously admitted that the "practical effect" of the Act's sign-and-then-cancel procedure is the same as a "true item veto." Br. for Applts. at 36 in *Raines v. Byrd*, No. 96-1671. The parties to this case thus agree that the Act was deliberately designed by Congress to accomplish two objectives: to comply with the procedural formalities of Article I, and to defeat the very purpose of those formalities. Appellees in the companion *Snake River* case, noting that the Constitution condemns " 'indirect attempt[s] to accomplish what the Constitution prohibits [Congress] from accomplishing directly,' " Br. for Appellees *Snake River* at

15. The requirement that the President sign or veto a presented bill *in toto* has been clear since the beginning of the Republic: "From the nature of the Constitution, I must approve all the parts of a Bill, or reject it in toto." 33 *Writings of George Washington* 96 (John C. Fitzpatrick ed. 1940). Eighteenth century explanations of the Presentment Clause are consistent with Washington's view. *See generally* 12 Op. Off. Legal Counsel 128 (1988). Later Presidents have understood that they could not approve or disapprove only parts of a bill. *Id.* at 157-65 (describing the view of Presidents Washington, Grant, Hays, Taft, Wilson, Ford and Reagan that they were required to sign or return multiple-item bills *in toto*, even though they approved of some items and disapproved of others). Thus, from the time of the Framers, there has been almost universal agreement that the President cannot sign some parts of a bill into law while rejecting other parts. *See generally Line Item Veto: The President's Constitutional Authority, Hearing on S. Res. 195 Before the Subcomm. on the Constitution of the Comm. on the Judiciary*, 103rd Cong. (1994).

35-36, (quoting *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 829 (1995)), argue that the Act unconstitutionally infringes the *in toto* requirement of the Presentment Clause, and we will not repeat their points here. For even if the requirements of the Presentment Clause, as Appellants argue, are strictly procedural and can be satisfied by a clever contrivance openly designed to evade them, the cancellation power conferred on the President under the Act nonetheless violates the requirements of Article I.

B. The Line Item Veto Act Unconstitutionally Confers upon the President an Article I Power to Repeal Duly Enacted Federal Laws at His Discretion.

Appellants concede that "[w]hen the President signs a tax or spending bill, '[the] bill when so signed becomes from that moment a law.' " Br. for Applts. at 34, quoting *La Abra Silver Mining Co. v. United States*, 175 U.S. 423, 454 (1899). And when the President cancels a tax or spending provision under the Act, it ceases from that moment to be a law. Once an item is canceled under the Act, it is *extinguished.* The term "cancel" is defined under the Act to mean "rescind," with respect to an item of discretionary budget authority, and "prevent . . . from having legal force or effect," with respect to an item of new direct spending and a limited tax benefit.[16] 2 U.S.C. § 691e(4). A presidential cancellation operates on the provision of law itself,[17] permanently removing it from the body of operative federal statutes.[18] Neither the President who canceled

16. The dictionary definition of the verb "repeal" is "1: to rescind or revoke (as a sentence of law) from operation or effect." *Byrd v. Raines*, 956 F. Supp. 25, 37 n.13 (D.D.C. 1997).

17. The Act specifies that a presidential cancellation "rescind[s]" the "budget authority" itself, and "prevent[s] . . . from having legal force or effect" the "specific provision of law" or the "specific legal obligation" authorizing the spending or limited tax benefit. 2 U.S.C. § 691e(4).

18. The Conference Report makes clear that "cancellation" permanently alters the rights of individuals, states, government contractors, and others with an interest in canceled items. H.R. Conf. (Cont'd)

the provision nor any successor President can exercise the authority that the provision, before its cancellation, had granted. It can be restored to the status of law only if it is reenacted according to the procedure prescribed by Article I.[19] In short, the power to "cancel" a duly enacted spending or tax code provision is the power to *repeal* the provision, plain and simple.[20]

The President's cancellation in this case illustrates the true nature of this power. In passing section 4722(c), Congress made a decision that New York State's health-care taxes qualify for federal matching funds. That decision became law when the President

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Rep. No. 104-491, at 29 (1996) (in different contexts cancellation negates the government's "legal obligation to pay a benefit," "eliminat[es] the increase in food stamp obligations that otherwise would occur," and "foreclose[s] the ability of the Federal Government to enter into an agreement to pay the amount of money provided in the law").

19. The Act provides an expedited procedure for congressional consideration and enactment of so-called "disapproval bills." A disapproval bill, however, must go through the full constitutional process of enactment, including bicameral passage and presentment to the President, although its consideration is expedited. *See* 2 U.S.C. § 691e(6).

20. The House-passed version of the Act, H.R. 2, used the terms "veto" and "repeal," and the related committee report confirmed that repeal was intended:

> Any provision of law, as set forth in the President's special message, shall be deemed *repealed* unless a rescission/ receipts disapproval bill restoring that provision is enacted into law.

See H.R. Rep. No. 104-11, pt. II, at 14 (1995) (emphasis added). The distinction between a temporary suspension (deferral) and a permanent repeal (rescission) was an essential element of the Impoundment Control Act as enacted in 1974. Although Congress changed the word to "cancel," it rejected the Administration's urgings to change the power given to the President to one of suspension only. *See* H.R. Conf. Rep. No. 104-491, at 20 (1996).

signed the Balanced Budget Act. The President disagreed with Congress' judgment and thus reversed its determination by exercising his power of cancellation. After the President's veto, section 4722 is gone; it has no legal force or effect. And neither the President nor Congress can bring it back without enacting new legislation. Quite simply, this measure has been repealed.

In *Chadha*, this Court held that the power to make law can be exercised only in accordance with the bicameral passage and presentment requirements of Article I.[21] *See also Metropolitan Wash. Airports Auth. v. Citizens for Abatement of Aircraft Noise, Inc.*, 501 U.S. 252, 274 n.19 (1991) ("[W]hen Congress legislates, when it makes binding policy, it must follow the procedures prescribed in Article I.") (quoting *Bowsher*, 478 U.S. at 757-59 (opinion of Stevens, J.)). And the *Chadha* Court made clear that "repeal of statutes, no less than enactment, must conform with Art. I." 462 U.S. at 954. There is simply no doubt whatsoever, therefore, that Article I would prohibit a statute reserving to Congress a unilateral cancellation power identical to that conferred upon the President under the Act. It follows that the President's cancellation power under the Act is unconstitutional and that his specific cancellation, his repeal, of section 4722(c) is void.

At the center of Appellants' constitutional defense of the Act is their contention that the President's cancellation power is not a unilateral power of repeal, but rather

> is, in practical effect, no more and no less than the power to "decline to spend" specified sums of money, or to "decline to implement" specified tax measures.

Br. for Applts. at 40. The Act, Appellants say, merely establishes a new "default rule" for spending and tax measures, granting the President general discretionary authority that is materially

21. 462 U.S. at 957. The legislative action at issue there was the effective repeal, through exercise of the one-House veto, of the statutory delegation of authority under which the Attorney General permitted Mr. Chadha to remain in the country.

indistinguishable from the specific discretionary authority granted to the President in "lump sum" appropriations measures, which have been enacted routinely by Congress since the days of President Washington. Appellants dismiss the Act's inconvenient (for their argument) use of the term "cancel" and its statutory definition ("rescind" and "prevent . . . from having legal force or effect") as "infelicitous terminology [that] cannot transform the cancellation into an unconstitutional amendment or repeal of an enacted law." Br. for Applts. at 40-41. In this regard, Appellants rely heavily upon this Court's decisions in cases, such as *Field v. Clark*, 143 U.S. 649 (1892), and *J.W. Hampton, Jr. & Co. v. United States*, 276 U.S. 394 (1928), which discussed approvingly statutory provisions granting the President discretion, Appellants say, to declare certain tariff acts and similar measures "repealed," "inoperative," and "of no effect." Br. for Applts. at 40. In truth, however, the statutes at issue in these and similar cases were upheld by this Court precisely because they did *not* vest the President with *discretion* to repeal or otherwise extinguish federal laws.

At issue in *Field* was a section of the Tariff Act of 1890 directing the President to "suspend" certain provisions of the Act permitting tariff-free importation of foreign agricultural products if the President determined that foreign governments were imposing "reciprocally unequal and unreasonable" tariffs on similar American products. *See* 143 U.S. at 680. This Court rejected the claim that the President's suspension power violated the "universally recognized" and "vital" principle that "congress cannot delegate legislative power to the president," emphasizing that "[h]e had *no discretion* in the premises . . . ." *Id.* at 692-93 (emphasis added).[22] "Nothing involving the expediency or the just operation of such legislation was left to the determination of the president." *Id.* at 693. To the contrary, when the President ascertained the fact that reciprocally unequal and unreasonable duties were imposed by

22. The *Field* Court noted that the only discretion vested in the President under the 1890 Tariff Act concerned "the duration of the suspension so ordered. But that related only to the enforcement of the policy established by congress." 143 U.S. at 693.

foreign governments on American products, "it became his duty to issue a proclamation declaring the suspension, as to that country, which congress had determined should occur." *Id.* The Court left no doubt that in suspending the operation of the Tariff Act, the President was executing the will of Congress rather than his own:

> As the suspension was absolutely required when the president ascertained the existence of a particular fact, it cannot be said that in ascertaining that fact, . . . in obedience to the legislative will, he exercised the function of making laws. Legislative power was exercised when congress declared that the suspension should take effect upon a named contingency. What the president was required to do was simply in execution of the act of congress.

Id.

As Appellants note, the *Field* Court cited earlier statutes authorizing the President (1) "to declare the repeal" of certain tariff provisions upon finding that discriminatory duties of foreign nations had been abolished; and (2) "to declare . . . inoperative" certain import restrictions upon a finding that the imported goods posed no threat of contagious diseases. But both of the referenced statutes fall well within the reasoning of the Court in *Field*, for they obliged the President to declare the repeal only upon his finding of a named contingency.

In *J.W. Hampton, Jr. Co. v. United States*, 276 U.S. 394 (1928), the Court extended this reasoning to a tariff statute requiring the President to "modify or terminate" import duties in accordance with his determinations concerning differences in the cost of production between similar domestic and foreign products. Relying specifically on *Field*, the Court held that the President's power to terminate the statutory tariff was not legislative in nature, for "[h]e was the mere agent of the lawmaking department to ascertain and declare the event upon which its expressed will was to take effect." *Id.* at 411. Congress, therefore, had performed the legislative function of determining whether a specific statutory provision would be removed from the body of operative federal law; the

President merely implemented Congress' decision by calling upon his uniquely executive capacities to investigate and to ascertain whether the contingency prescribed by Congress had been satisfied.[23]

The statutes upheld in *Field* and *J.W. Hampton* are thus materially indistinguishable from legislation containing a standard sunset provision prescribing a date certain for its own expiration. In executing such a provision the President's role is the same — he must ascertain whether the contingency prescribed by Congress has occurred, although he need only consult a calendar to do so. On the prescribed sunset date, the President must declare the legislation expired; he has no discretion to continue enforcing it. No one would seriously contend that such a sunset provision vests a unilateral power of repeal in the President, and the provisions upheld in *Field* and *J.W. Hampton* differed only in that the President was required to exercise a more subjective judgment in ascertaining the existence of the prescribed conditions. Still, he is duty-bound to exercise his judgment in good faith, as the *Field* Court made clear.[24]

The Line Item Veto Act, in stark contrast, confers upon the President *discretion* to decide whether certain duly enacted spending and tax laws will continue to exist, or cease to exist. There can be

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23. Congress may feel itself unable conveniently to determine exactly when its exercise of the legislative power should become effective, because dependent on future conditions, and it may leave the determination of such time to the decision of an executive. . . .

J.W. Hampton, 276 U.S. at 407.

24. The Tariff Act of 1890 required the President to suspend duty-free importation of foreign products whenever American products were subjected to tariffs that "he may deem to be reciprocally unequal and unreasonable." 143 U.S. at 698. The Court rejected the notion that the words "he may deem" vested the President with discretion. Rather, the President was duty-bound under the Act to investigate foreign tariff regulations and to "form a judgment as to whether they were reciprocally equal and reasonable." *Id.* at 692.

no serious doubt that in making his decision, the President is guided by no standard other than whether he favors the item; he exercises his cancellation power *at his pleasure*, implementing his own will rather than that of Congress. The Act , after all, was designed for the sole purpose of granting the President the functional equivalent of a true line-item veto. By contrast, under the statutes upheld in *Field*, *J.W. Hampton*, and similar cases, the President merely carried out the instructions of Congress concerning the conditions under which certain provisions would cease to exist.

Appellants respond to this point with two arguments, neither of which has merit. First, noting that Congress was fully aware of the "possibility that individual items [of the Balanced Budget Act] would be canceled . . . at the moment of their passage," Appellants contend that the cancellations at issue here reflect, rather than subvert, the will of Congress. Br. for Applts. at 39. It is certainly true that when Congress enacted the Line Item Veto Act, it expected the President to use it. But that fact simply does not address the question whether the power granted to the President under the Act is constitutional. Indeed, Appellants' argument could be used to justify a statute granting the President unilateral power to entirely rewrite, rather than simply to cancel, recently enacted federal laws. More fundamentally, Appellants are simply wrong. Section 4722(c) was enacted by Congress as part of the Balanced Budget Act, was presented to the President, and was signed into law. The will of Congress was reflected in section 4722(c). As the district court below observed, the Balanced Budget Act that "resulted after the President's line item veto [of Section 4722(c) was] different from [the law] consented to by both Houses of Congress." J.S. App. 24a. And the Balanced Budget Act *without* section 4722(c) reflected only the will of the President. Appellants' argument to the contrary is specious.

Secondly, Appellants attempt to establish that the President's cancellation power is guided and limited by "meaningful constraints" under the Act. Br. for Applts. at 46. It plainly is not. The requirements that the President cancel an item within five days after signing a bill, and that he cancel only whole items, simply

reflect the intention to give him an item veto in the legislative process; they do not give him significant guidance on how much to cancel or which programs to eliminate. That the President, by virtue of the Act's "lock box" feature, has no authority to divert canceled funds for other purposes merely reflects that he has been granted a unilateral power of repeal rather than of revision. The requirement that he "consider the legislative history, construction, and purposes of the law which contains the" canceled items, as well as "any specific sources of information referenced in such law," appears to relate only to the identification of what is an "item" and in any event does not meaningfully constrain his discretion. That the President must articulate his reasons for canceling an item only mirrors the constitutional requirement that he include "his Objections" when he "returns" a bill. U.S. Const., art. I., § 7, cl. 2. It certainly does not constrain what those reasons may be.

Appellants also point to the provision of the Act requiring the President to determine that his cancellation of a spending item or limited tax benefit will "(i) reduce the federal budget deficit; (ii) not impair any essential Government functions; and (iii) not harm the national interest." 2 U.S.C. § 691e(a)(A). While these provisions may be "intelligible," they are hardly constraints on the President's cancellation discretion. The first requirement is a tautology; if the government's spending is reduced, its deficit will be reduced. And the other two criteria may be taken as givens. Telling the President that he may not use his cancellation power to knowingly and gratuitously harm the national interest or impair an essential government function simply does not serve to limit the options otherwise available to him.[25] Certainly these criteria would not provide a basis for judicial review of a Presidential cancellation under the Act.[26]

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25. Appellants note that certain items of "direct spending" are not subject to the President's cancellation authority. Br. for Applts. at 47. Appellants do not explain how this fact operates to constrain the President's discretion with respect to items that are within his cancellation authority.

26. "Executive action is always subject to check by the terms of (Cont'd)

Given that the sole purpose of the Line Item Veto Act was to replicate the President's constitutional veto power, it would be strange indeed if the Act placed serious constraints on the President's cancellation discretion. It does not. Rather, it grants the President the purely legislative authority to repeal certain spending and revenue measures, bounded only by his own view of which previously legislated programs should continue to exist. And if Congress disagrees with his cancellations, it has the "onus" of passing new laws to overturn the President's policy decisions.[27]

C. The President's Cancellation Power Under the Act is Not a Delegation of Article II Discretionary Authority over Spending.

Throughout their opening brief, Appellants liken the President's cancellation authority under the Act to his discretion under so-called "lump-sum" or "sums not exceeding" appropriations measures, which typically accord to the President discretion concerning how much (if any) of the appropriated funds to spend on particular programs. Noting that the general operations of the government during the Washington Administration were funded through lump-sum appropriations acts, Appellants note that

> [t]he Members of the First Congress evidently saw no constitutional impediment to vesting the

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the legislation that authorized it; and if that authority is exceeded it is open to judicial review." *Chadha*, 462 U.S. at 953 n.16. The Act makes no serious pretense of providing any such judicially enforceable "check" precisely because it confers upon the President a discretionary lawmaking power.

27. The Conference Report for the Act candidly states:

> The purpose of the [Act] is to promote savings by placing the onus on Congress to overturn the President's cancellations of spending and limited tax benefits.

H.R. Conf. Rep. No. 104-491, at 16 (1996).

> Executive Branch with broad discretion over the disposition of appropriated funds.

Br. for Applts. at 44.

Nor do we. But the dispositive distinction between a lump-sum appropriations statute and the Line Item Veto Act is that the former grants the President discretion, perhaps sweeping and unbounded, in the *implementation* of the spending measure, while the Line Item Veto Act grants the President discretion, sweeping and unbounded, to *extinguish* the spending measure. Surely Appellants can grasp the difference between a statute that says this,

> For Fiscal Year 1998 the President is authorized to spend, at his pleasure and without restriction, a sum not exceeding [fill in blank] dollars on the programs and operations of the Department of [fill in blank],

and one that says this,

> For Fiscal Year 1998 the President is authorized to repeal, at his pleasure and without restriction, any provision of this Act authorizing expenditures for the programs and operations of the Department of [fill in blank].

The spending discretion granted under a lump-sum appropriation statute can be exercised by the President at any time during the appropriation period, and an exercise of the granted discretion does not disturb, let alone extinguish, the underlying appropriation law. If the President decides not to spend some or all of the appropriated funds, the authority to spend the funds — that is, the law itself — remains in place until it expires in accord with the terms of the statute. The President (or his successor) retains discretion throughout the appropriation period to reverse a prior decision not to spend in light of new information, further experience, or reordered priorities. Not until the appropriation law expires, or is repealed in accord with Article I, is the President's spending discretion extinguished. In short, discretion over spending operates on the funds, not on the law authorizing it.

In contrast, the President's cancellation discretion under the Act operates directly on the law authorizing the spending, rescinding it or rendering it of no legal force or effect. A cancellation strikes the spending or tax provision itself, permanently. And if the President (or his successor) subsequently changes his mind about the wisdom of a canceled item, such as section 4722(c), he is powerless to revive it, for his cancellation extinguished the law itself.

Appellants suggest that the permanent and irrevocable nature of a cancellation under the Act poses a lesser threat to the separation of powers than does a revocable exercise of spending discretion under a typical lump-sum appropriation measure. They argue that

> the discretion conferred on the President by the Act is plainly *narrower* than would be the case if the President were authorized to revisit the question whether particular expenditures should be made.

Br. for Applts. at 41. But the constitutional difficulty presented by the President's power to cancel spending and revenue laws has less to do with the *breadth* of the discretion granted under the Act than with the *kind* of discretion granted under the Act. The irrevocable nature of a cancellation simply demonstrates that the discretion vested in the President under the Act is not an Article II discretion to execute spending and revenue measures in accordance with his judgment, but rather is an Article I discretion to extinguish spending and revenue measures in accordance with his judgment.[28]

28. Appellants note that Executive Branch officials are often required to make irrevocable decisions within limited periods of time, such as the decision to initiate a suit or to file a notice of appeal within the time set by statute. Br. for Applts. at 41. That a President, like everyone else, must abide by jurisdictional time limits governing litigation in federal courts simply does not speak to the question whether Congress may grant the President the Article I power to repeal, at his pleasure, a duly enacted federal law. The answer to this question, we submit, does not change depending upon the amount of time that the President is given to exercise his cancellation power. If the Act's five-

(Cont'd)

Appellants have cited no case, and we have found none, upholding a congressional delegation to the President of discretionary authority to repeal federal statutory law. The delegation cases upon which Appellants rely fall largely into two lines. One line of cases involves delegations to the President and administrative agencies of quasi-legislative authority to "fill up the details" in general statutory provisions. *Wayman v. Southard*, 23 U.S. (10 Wheat.) 1 (1825). By far the more numerous,[29] these cases require

> that Congress lay down the general policy and standards that animate the law, leaving the agency to refine those standards, "fill in the blanks," or apply the standards to particular cases.

Industrial Union Dep't v. American Petroleum Inst., 448 U.S. 607, 675 (1980) (Rehnquist, J., concurring). The cases usually involve statutory delegations that call upon the President's uniquely executive capacities to gather facts, marshal special expertise, and move with relative dispatch.[30] In some cases, the gaps to be filled

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(Cont'd)
day cancellation provision is constitutional, so also would be a cancellation provision giving the President a five-month, five-year, or unlimited period in which to exercise his power.

29. *See, e.g., Loving v. United States*, 517 U.S. 748 (1996); *Touby v. United States*, 500 U.S. 160 (1991); *Skinner v. Mid-America Pipeline Co.*, 490 U.S. 212 (1989); *Mistretta v. United States*, 488 U.S. 361 (1989); *FEA v. Algonquin SNG, Inc.*, 426 U.S. 548 (1976); *Lichter v. United States*, 334 U.S. 742 (1948); *American Power & Light Co. v. SEC*, 329 U.S. 90 (1946); *Yakus v. United States*, 321 U.S. 414 (1944); *NBC v. United States*, 319 U.S. 190 (1943); *New York Central Secs. Corp. v. United States*, 287 U.S. 12 (1932).

30. *See, e.g., Touby, supra* (Attorney General temporarily scheduled controlled substances on specified factual finding); *Lichter, supra* (in wartime, administrative officials renegotiated defense contracts on finding that profits were excessive); *Yakus, supra* (in wartime, Executive set price-ceilings after making a series of highly (Cont'd)

are wide and the delegated discretion is correspondingly broad. *See, e.g., NBC v. United States*, 319 U.S. 190, 215-16 (1943) (authorizing FCC to regulate broadcast licensing in accord with "public interest, convenience, or necessity"); *Yakus v. United States*, 321 U.S. 414, 426-27 (1944) (authorizing Executive in wartime to set "generally . . . fair and equitable" price ceilings that will "effectuate the purposes" of the law). The exercise of such delegated authority must be statutorily guided by "an intelligible principle," *Mistretta v. United States*, 488 U.S. 361, 372 (1989), and "is always subject to check by the terms of the legislation that authorized it; and if that authority is exceeded it is open to judicial review . . . ." *Chadha*, 462 U.S. at 953 n.16. But, again, while Congress may delegate to the President sweeping discretionary authority to implement federal law, Congress may not delegate any authority to extinguish it.

The other line of delegation cases is exemplified by *Field* and *J.W. Hampton*, discussed in detail above. In these cases, as the district court in *Raines* explained succinctly,

> the Supreme Court recognized the practice of "legislating in the contingency," that is, where Congress itself determines in advance when conditions yet to occur should cause the law to cease to be operative. The President is merely the instrument of its will.

Byrd v. Raines, 956 F. Supp. at 37. As previously demonstrated, in canceling a duly enacted spending or revenue provision, the President exercises his own will, not Congress'. Appellants conclude their opening brief by noting that the district court found the President's power to cancel limited tax benefits "especially problematic." Appellants argue that this power "is also a form of discretionary administrative authority," Br. of Applts. at 47-48, but do not deny that cancellation of a limited tax benefit, which

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(Cont'd)
factual determinations); *Hope Natural Gas v. Federal Power Comm'n*, 196 F.2d 803 (4th Cir. 1952) (agency may set power rates after fact-finding).

nullifies a statutory provision entitling its beneficiaries to keep their own money, is not analogous to cancellation of an item of federal spending authority. Cancellation of a tax benefit simply cannot be reasonably characterized as a failure to spend federal funds, and thus cannot be likened to an exercise of discretion not to spend under a lump sum appropriation.

Here, cancellation of section 4722(c), which established as a matter of law that the disputed federal matching funds belong to New York, is precisely analogous to cancellation of a limited tax benefit, rather than an item of spending authority. Moreover, it is clear, contrary to Appellants' claim, Br. of Applts. at 48 n.28, that the Act's cancellation powers are not severable and that invalidation of the Act's provisions regarding limited tax benefits (or spending authorities) would require invalidation of the entire Act, as the brief of amici Reps. Skaggs, *et al.* makes clear.

In sum, however broad the Congressional power to delegate quasi-legislative authority to the Executive may be, it does not extend so far as to support the Line Item Veto Act.

CONCLUSION

The judgment of the district court should be affirmed.

Respectfully submitted,

CHARLES J. COOPER
DAVID H. THOMPSON
COOPER, CARVIN
& ROSENTHAL, PLLC
2000 K Street, N.W.
Suite 401
Washington, D.C. 20006
(202) 822-8950

M. SEAN LAANE
ARNOLD & PORTER
555 12th Street, N.W.
Washington, D.C. 20004
(202) 942-5000

* *Counsel of Record*

MICHAEL D. HESS
Corporation Counsel of the City of New York

LEONARD J. KOERNER*
Chief Assistant Corporation Counsel
ALAN G. KRAMS
DAVID B. GOLDIN
Assistant Corporation Counsels
New York City Law Department
100 Church Street
New York, New York 10007
(212) 788-1010

RICHARD FERRERI
General Counsel
District 37, American Federation of State, County & Municipal Employees
125 Barclay Street
New York, New York 10007
(212) 815-1450

PETER F. NADEL
ROSENMAN & COLIN, LLP
575 Madison Avenue
New York, New York 10022
(212) 940-7010

BASIL PATTERSON
MEYER, SUOZZI, ENGLISH
& KLEIN, P.C.
Counsel for Local 1199, National Health and Human Service Employees Union
1505 Kellum Place
Mineola, New York 11501
(516) 741-6565

Attorneys for Appellees
City of New York, et al.

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In the Supreme Court of the United States

OCTOBER TERM, 1997

WILLIAM J. CLINTON, ET AL., APPELLANTS

v.

CITY OF NEW YORK, ET AL.

ROBERT E. RUBIN, APPELLANT

v.

SNAKE RIVER POTATO GROWERS, INC., ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

REPLY BRIEF FOR THE APPELLANTS

SETH P. WAXMAN
Solicitor General
Counsel of Record
Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

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ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

REPLY BRIEF FOR THE APPELLANTS

A. The Case Is Non-Justiciable

This case is non-justiciable, since appellees have not shown that they have suffered any concrete injury, or that they are in imminent danger of doing so, as a result of the President's exercise of his cancellation authority. We acknowledge the significant public and governmental interest in obtaining a prompt, dispositive resolution of the Line Item Veto Act's constitutional status. This Court, however, has repeatedly recognized the "overriding and time-honored concern about keeping the Judiciary's power within its proper sphere," *Raines* v. *Byrd*, 117 S. Ct. 2312, 2318 (1997), that is reflected in the "case" or "controversy" requirement of Article III of the Constitution. In the long run, strict adherence to that requirement protects the separation of powers, see, *e.g.*, *Allen* v. *Wright*,

468 U.S. 737, 750 (1984), and conserves the resources of both the Executive and Judicial Branches, by ensuring that litigation in the federal courts is employed "only in the last resort, and as a necessity in the determination of real, earnest and vital controversy," *Valley Forge Christian College* v. *Americans United for Separation of Church and State, Inc.*, 454 U.S. 464, 472 (1982) (quoting *Chicago & Grand Trunk Ry.* v. *Wellman*, 143 U.S. 339, 345 (1892)). The judgment of the district court should therefore be vacated, on the ground that the court lacked jurisdiction to hear the case.[1]

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[1] In our opening brief (at 16-17) we explain that most of the appellees are not "individual[s]" entitled to invoke the judicial review provision of the Line Item Veto Act, 2 U.S.C. 692(a)(1) (Supp. II 1996). That fact does not, however, divest this Court of jurisdiction over this appeal. The Court's appellate jurisdiction under the Act's judicial review provision extends to "any order of the [district court] which is issued pursuant to an action brought under" Section 692(a)(1). 2 U.S.C. 692(b) (Supp. II 1996). The judgment from which the government appealed is clearly such an order. That is so both because all of the appellees "brought" this case (whether properly or not) under Section 692(a)(1), by invoking it as a jurisdictional basis for their suits (and as the *only* basis for laying venue in the District of Columbia), see J.A. 12-13, 22, and because Mike Cranney—one of the *Snake River* appellees— is an "individual" within the meaning of the Act. (To eliminate any possibility that the district court's decision might escape review, however, the government has also filed a notice of appeal to the District of Columbia Circuit.)

Although this Court has jurisdiction over the entire case, Section 692(a)(1)'s limitation to "individual[s]" does affect the proper disposition of the appeal. The Court may consider appellees' constitutional challenges on the merits only if it concludes (with respect to each cancellation) that at least one plaintiff satisfies *both* the constitutional and statutory requirements for invoking the power of the district court. The *Snake River* appellees have made no effort to explain how appellee Cranney has suffered injury in fact. The remaining appellees do not satisfy the statutory prerequisites for obtaining judicial review and therefore would not be proper plaintiffs even if the Court concluded that they meet the requirements of Article III.

1. a. Under Article III, "[a] claim is not ripe for adjudication if it rests upon contingent future events that may not occur as anticipated, or indeed may not occur at all." *Texas* v. *United States*, No. 97-29 (Mar. 31, 1998), slip op. 4 (internal quotation marks omitted). Under that standard, the claims of the *City of New York* appellees are manifestly non-justiciable. As we explain in our opening brief (see Gov't Br. 10, 20), appellees will not suffer any financial injury unless the Secretary of Health and Human Services ultimately denies New York's pending waiver applications. Even then, the prospect of injury is contingent on independent decisions by the State of New York regarding the state tax liability of appellee health care providers. As a result, whether appellees will ever suffer any financial injury depends on "contingent future events that * * * may not occur at all." *Texas*, slip op. 4.

Because the prospect of future financial injury depends on the outcome of unresolved administrative waiver applications, the standing and ripeness issues in this case

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Appellees' invocation of 28 U.S.C. 1331 (see J.A. 12, 22) does not alter that analysis. The citation to Section 1331 appears to have been intended to assure a jurisdictional basis for appellees' suits under 2 U.S.C. 692 (Supp. II 1996), since that provision does not in terms confer jurisdiction on the district courts. Section 1331 does not create a cause of action, much less authorize adjudication of a suit against the government absent an independent waiver of sovereign immunity. *Cf. FDIC* v. *Meyer*, 510 U.S. 471, 475, 483-486 (1994); *United States* v. *Nordic Village, Inc.*, 503 U.S. 30, 37-38 (1992). Appellees have not identified any statutory provision other than Section 692(a)(1) that could plausibly be thought to waive the sovereign immunity of the United States and allow this suit to proceed in its present form. The absence of any "final agency action" would alone preclude appellees from invoking the judicial review provisions of the Administrative Procedure Act, 5 U.S.C. 701 *et seq*. Further questions would arise in *City of New York* with respect to whether plaintiffs other than the State itself may sue the Secretary under the Medicaid program, and the *Snake River* appellees could not circumvent the statutory procedures for litigation of tax issues.

closely resemble those in *Anderson* v. *Green*, 513 U.S. 557 (1995) (per curiam). See Gov't Br. 20-21. Appellees seek to distinguish *Anderson* on the ground that the plaintiffs there faced injury if the waiver application were granted, while appellees face injury if the waiver application is denied. City of N.Y. Br. 22-23. That, however, is a distinction without a difference. What made the claims in *Anderson* non-justiciable was the contingent nature and uncertain outcome of the waiver process (see 513 U.S. at 559), and the waiver process here is equally contingent and uncertain.

Appellees insist that New York's waiver applications "will almost certainly be denied." City of N.Y. Br. 19. Nothing in the record, however, supports that bald assertion. Contrary to appellees' claim (*id.* at 22), HHS has not "tipped its hand regarding the waiver applications."[2] And as we explain in our opening brief (at 22-23 n.9), when the President certified that the cancellation of Section 4722(c) of the Balanced Budget Act of 1997 would reduce the budget deficit, he was describing the effect of the cancellation on existing budget authority, not foretelling the outcome of the administrative waiver process.

b. Appellees also argue that the President's cancellation of Section 4722(c) caused them an immediate injury by "reinstating the potential, large or small, of HHS disapproval" of New York's waiver applications. City of N.Y. Br. 14. Appellees assert that "no matter what the likelihood that HHS might ultimately grant New York waivers," the mere change "from being protected against loss

[2] Appellees point (City of N.Y. Br. 20 n.7) to alleged statements by HHS officials that "there would be no resolution of New York's waivers absent resolution of waivers for all states." See J.A. 106. Saying that New York's waiver applications will not be "resolved" without a global resolution is, of course, very different from saying that the waiver applications will be denied.

to being once again exposed" constitutes a cognizable injury for Article III purposes. *Id.* at 15, 18.

That argument treats the bare risk of future injury, "no matter what [its] likelihood" (City of N.Y. Br. 15), as sufficient to support the exercise of jurisdiction under Article III. This Court's precedents, however, are directly to the contrary. They require that the risk of future injury be significant and imminent before federal courts will undertake the task of adjudicating the constitutionality of government actions. See, *e.g.*, *Los Angeles* v. *Lyons*, 461 U.S. 95, 102 (1983) ("[The] threat of injury must be both real and immediate, not conjectural or hypothetical.") (internal quotation marks omitted); *Babbitt* v. *United Farm Workers National Union*, 442 U.S. 289, 298 (1979) (plaintiff "must demonstrate a realistic danger of sustaining a direct injury"); *United Public Workers* v. *Mitchell*, 330 U.S. 75, 89-90 (1947) ("[a] hypothetical threat is not enough"). The Court's insistence on a "real and immediate" risk of injury cannot be evaded by characterizing the absence of an absolute protection from future harm as a judicially cognizable injury.[3]

c. Appellees also contend that being forced to proceed before an improper "forum" (here, the HHS waiver process) constitutes a cognizable injury for Article III purposes, even if the forum might ultimately provide the desired relief. City of N.Y. Br. 15-16. That argument is without merit. Any burden or expense that might be associated with the administrative process will be borne by the State of New York, compare *Thomas* v. *Union*

[3] In *Anderson* v. *Green* (see pp. 3-4, *supra*), it could equally well have been said that affirmance of the lower court's decision striking down the challenged statutory provision would have eliminated any risk that the provision would ultimately injure the plaintiffs. The Court nevertheless found the case to be non-justiciable in light of the existing uncertainty regarding the outcome of the HHS waiver process. See 513 U.S. at 559.

Carbide Agricultural Products Co., 473 U.S. 568, 581 (1985) (plaintiff's challenge to the constitutionality of a statute calling for binding arbitration held ripe for review where the plaintiff already "ha[d] engaged in an arbitration lasting many months and consuming 2,700 pages of transcript"), and any entitlement that Section 4722(c) might be thought to have created likewise rests with the State.[4] Appellees cannot claim to be injured by compelled participation in a "forum" to which they are not parties.

Thus, any cognizable injury that might be caused by prolonging the HHS waiver process will be imposed not upon appellees, but upon the State of New York. And as we explain in our opening brief (at 23-25), any financial harm that appellees may ultimately suffer as a result of the challenged cancellation would be purely derivative of the State's loss of federal Medicaid funding. The record in this case does not reveal why the State has declined to file suit. It may be that state officials believe that the administrative process will yield a favorable result, and that they prefer to work within that process and obtain a final agency decision before turning to the courts. It is also possible that New York's political leaders—like the Congress that passed the Line Item Veto Act and the President who signed it—believe the Act to be constitutional. Whatever the reasons for the State's forbearance, however, appellees should not be permitted to demand judicial resolution of a claim that the State itself has declined to

[4] Appellees therefore err in invoking the proposition that "Congress may enact statutes creating legal rights, the invasion of which creates standing, even though no injury would exist without the statute." City of N.Y. Br. 15 (quoting *Linda R.S.* v. *Richard D.*, 410 U.S. 614, 617 n.3 (1973)). Even assuming *arguendo* that Section 4722(c) created "legal rights" whose "invasion" by the President's cancellation "create[d] standing," those rights belong to the State of New York, not to appellees.

pursue—particularly in the absence of any showing that appellees have suffered harm.

2. The claims of the *Snake River* appellees are likewise non-justiciable. As we explain in our opening brief (at 26-32), appellees have not shown either that the cancellation of Section 968 of the Taxpayer Relief Act of 1997 has prevented them from consummating any qualifying transaction that would otherwise have taken place, or that the cancellation has altered the terms of any such transaction.

a. As an initial matter, appellees state that Congress intended for Section 968 to benefit farmers' cooperatives. Snake River Br. 20-21. We have no quarrel with that assertion. But the fact that Section 968 was intended to benefit a *class* of farmers' cooperatives is hardly sufficient to show that Section 968 would have benefitted appellees in particular. See *Warth* v. *Seldin*, 422 U.S. 490, 502 (1975) ("Petitioners must allege and show that they personally have been injured, not that injury has been suffered by other, unidentified members of the class to which they belong."); *Valley Forge*, 454 U.S. at 489 ("[t]he law of averages is not a substitute for standing").

b. Appellees assert that they were taking "concrete and specific steps" toward purchasing the IPP processing facility and that the President's cancellation of Section 968 "thwarted the[ir] plans." Snake River Br. 23. They do not allege, however, that as a result of the cancellation IPP terminated the negotiations, increased its asking price, or otherwise insisted on terms less favorable to appellees. Instead, appellees themselves unilaterally discontinued the negotiations, without (as far as the record indicates) even inquiring about IPP's willingness to pursue the proposed transaction. See J.A. 114. It therefore remains purely speculative whether the cancellation actually prevented the transaction from proceeding. That kind

of speculation is often characteristic of cases in which "the plaintiff is not himself the object of the government action or inaction he challenges," *Lujan* v. *Defenders of Wildlife*, 504 U.S. 555, 562 (1992), and is inadequate to establish the requisite causal nexus between the President's actions and appellees' asserted injuries.

c. Alternatively, appellees assert that "a plaintiff who is actively pursuing a prospective acquisition of property, or actively negotiating a prospective contract, has standing to challenge government action that concretely and adversely affects the process of pursuit." Snake River Br. 22. None of the cases cited by appellees, however, supports that proposition. Most of the cases involve challenges to government actions that burdened *existing* contractual relationships, not hypothetical "prospective" ones. See *Bennett* v. *Spear*, 117 S. Ct. 1154, 1159 (1997); *Secretary of State* v. *Joseph H. Munson Co.*, 467 U.S. 947, 950 (1984); *Village of Arlington Heights* v. *Metropolitan Hous. Dev. Corp.*, 429 U.S. 252, 256-257, 261 (1977). The Court's decision in *Northeastern Florida Chapter of Associated General Contractors of America* v. *City of Jacksonville*, 508 U.S. 656 (1993), is inapposite because, as we explain in our opening brief (at 33), its "equal footing" analysis was explicitly predicated on the underlying presence of an equal protection claim. And in *Bryant* v. *Yellen*, 447 U.S. 352 (1980), the federal laws in question effectively ensured that "excess" property would be sold, and at below-market prices. See Gov't Br. 30 n.14. Here, by contrast, there is no assurance that any "qualified refiner or processor" would sell its stock to putative buyers such as appellees, much less that it would share with them the tax benefits conferred on it by Section 968.

B. The Line Item Veto Act Is Constitutional

If this Court concludes that appellees' claims are justiciable, the judgment of the district court should be reversed. The President's cancellation of the budgetary items at issue in this case was a legitimate exercise of executive power, not an impermissible exercise of legislative authority.

1. In our opening brief (at 33-35), we explain that the Line Item Veto Act does not conflict with the procedural requirements of the Presentment Clause because the Act does not come into play until after those requirements have been satisfied. When the President is presented with a spending or tax bill, he must "sign" or "return" (Art. I, § 7, Cl. 2) it in its entirety. When he signs the bill, it becomes a law, and the "finely wrought" lawmaking procedures of the Presentment Clause (*INS* v. *Chadha*, 462 U.S. 919, 951 (1983)) are complete. The President's cancellation of individual items after a tax or spending bill has been signed into law represents an exercise of the Article II power to execute the laws, not a partial "return" of a presented bill.

Appellees appear to acknowledge that cancellation under the Act complies with the literal terms of the Presentment Clause. They contend, however, that the Act operates "to defeat the very purpose of" Article I's procedural requirements (City of N.Y. Br. 30), and that it represents "a forbidden 'indirect attempt to accomplish what the Constitution prohibits accomplishing directly'" (Snake River Br. 35) (brackets and ellipsis omitted) (quoting *U.S. Term Limits, Inc.* v. *Thornton*, 514 U.S. 779, 829 (1995)). Those arguments reflect a fundamental misunderstanding of the purpose of Article I's *in toto* requirement.

The Presentment Clause establishes precise and detailed procedural requirements governing the presentment by Congress and approval by the President of any "Bill." Art. I, § 7, Cl. 2. The Framers imposed no restrictions, however, on the number or variety of provisions that a single "Bill" may contain. While a narrow, discrete

provision (*e.g.*, Section 4722(c) of the Balanced Budget Act, or Section 968 of the Taxpayer Relief Act) could be passed by Congress and approved by the President as a separate bill, Congress's typical practice in recent years has been to combine numerous and disparate spending or tax items into a single bill, to be approved or returned by the President in its entirety. See Gov't Br. 35.

When Congress chooses to pass bills of that character, the effect of the *in toto* requirement is to compel the President to make an all-or-nothing choice regarding a broad and multifarious legislative package, even though he might prefer to accept some items and reject others. See Gov't Br. 35. Appellees are mistaken, however, in suggesting that the *purpose* of the *in toto* requirement is to compel the President to make such choices. Nothing in the Presentment Clause reflects a constitutional preference that individual bills should be broad or multifarious rather than narrow or discrete. Rather, the *in toto* requirement serves to ensure that *Congress* retains ultimate authority to define the range of choices available to the President. Congress may (by passing complicated "omnibus" bills) restrict the President to a single all-or-nothing choice on a large package of items; but it may also (by voting on and passing individual items separately) choose to increase the President's flexibility to accept some items and reject others. Because the *in toto* requirement serves only to protect *Congress's* ability to define the range of options available to the President, and embodies no rule or preference as to what that range should be, a decision by Congress itself to increase the President's flexibility cannot reasonably be said "to defeat the very purpose" (City of N.Y. Br. 30) of the Presentment Clause's requirements.

For basically the same reasons, there is no merit to the *Snake River* appellees' contention (at 35) that the Line

Item Veto Act represents an "indirect" attempt to accomplish what could not be done "directly." Stripped to its essentials, appellees' complaint is that the Line Item Veto Act permitted the President to make an up-or-down choice with respect to Section 968 of the Taxpayer Relief Act, unconstrained by his preferences regarding other items contained within that Act. Congress could have accomplished the same result "directly," however, simply by voting on and passing Section 968 as a separate bill, which the President could "sign" or "return."[5] Given the logistical impracticality of conducting a separate vote on every tax and spending item, Congress sought to fashion a different mechanism for increasing the President's role in the budget process. In so doing, Congress was of course obligated to comply scrupulously with the procedural requirements of Article I. But there is no basis for appellees' view that the Act should be regarded with suspicion on the theory that it was designed to accomplish an illicit end.

2. Appellees' principal theory is that the Act improperly authorizes the President to effect a unilateral amendment or repeal of provisions of an enacted law. Thus, the *City of New York* appellees state (at 32-33):

> In passing section 4722(c), Congress made a decision that New York State's health-care taxes qualify for federal matching funds. That decision became law when the President signed the Balanced Budget Act. The President disagreed with Congress' judgment and thus reversed its determination by exercising his power of cancellation.

---

[5] Indeed, the President's discretion with respect to Section 968 of the Taxpayer Relief Act was more constrained than would have been the case if that Section had been passed as a separate bill, since the President was required to make specific findings as a predicate to his exercise of cancellation authority under the Line Item Veto Act. See Gov't Br. 8, 46.

The *Snake River* appellees likewise contend (at 37) that the Act's "basic defect" is that "Congress is *never* given the opportunity to vote on the truncated law that resulted from the President's cancellation." They attempt (at 48) to distinguish the President's cancellation power from grants of discretionary authority previously approved by this Court on the ground that prior grants of power "d[id] not permit the delegate to overrule or cancel what Congress has specifically prescribed."

As we explain in our opening brief (at 38-40), those arguments cannot be reconciled with the fundamental principle that Congress is presumed to legislate with an awareness of existing law. Congress might have provided that Section 4722(c) of the Balanced Budget Act, or Section 968 of the Taxpayer Relief Act, would not be subject to the President's cancellation authority. See *Raines*, 117 S. Ct. at 2320 (Congress may "exempt a given appropriations bill (or a given provision in an appropriations bill) from the [Line Item Veto] Act"). Its failure to do so must be construed to reflect congressional intent that the President be permitted *either* to implement *or* to cancel the spending and tax items contained within those provisions.[6] In cancelling those items, the President did not "disagree[] with Congress' judgment and thus reverse[] its determination" (City of N.Y. Br. 33), nor did he "overrule or cancel what Congress ha[d] specifically prescribed" (Snake River Br. 48). He simply exercised one of the options conferred on him by Congress itself.

The fact (see Snake River Br. 37) that Congress did not vote on the President's cancellations is legally irrelevant. Congress may, for a variety of legitimate reasons, vest

[6] As we observe in our opening brief (at 39 n.24), that intent is particularly apparent with respect to Section 968 of the Taxpayer Relief Act, which was expressly identified in the Act itself as a "limited tax benefit[] subject to line item veto." § 1701, 111 Stat. 1099, 1101.

Executive Branch officials with discretion in their administration of federal law. Congress may (as here) confer that discretion explicitly. It may also do so implicitly, by employing statutory language that is insufficiently specific to resolve a particular dispute. See, *e.g.*, *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837, 865 (1984); *Smiley* v. *Citibank (South Dakota), N.A.*, 116 S. Ct. 1730, 1733 (1996). When Executive Branch officials exercise discretion within a range of authority conferred by statute, Congress need not conduct a second vote to approve the precise manner in which that discretion has been exercised. Indeed, to require Congress to express its approval at that level of specificity would defeat the purposes of conferring discretionary authority. So long as the cancellations at issue in this case fell within the scope of the President's authority under the relevant statutes—and it is undisputed that they did—the fact that Congress did not vote to approve those cancellations presents no Article I problem. See Gov't Br. 37-38 & n.23.[7]

[7] The *Snake River* appellees' reliance (at 40) on *INS* v. *Chadha*, 462 U.S. 919, 952 (1983), is particularly misplaced. The passage on which appellees rely states that a House of *Congress* must enact legislation in accordance with Article I in order to "alter[] the legal rights, duties, and relations of persons * * * outside the Legislative Branch." *Ibid.* The Court did not suggest that the same requirement applies to the exercise by Executive Branch officials of discretionary authority conferred by statute. To the contrary, the *Chadha* Court recognized that "[e]xecutive action under legislatively delegated authority that might resemble 'legislative' action in some respects is not subject to the approval of both Houses of Congress and the President for the reason that the Constitution does not so require." *Id.* at 953 n.16.

There is likewise no merit to the *City of New York* appellees' contention (at 33) that because "Article I would prohibit a statute reserving to Congress a unilateral cancellation power identical to that conferred upon the President under the Act," the authority conferred upon the President must be unconstitutional as well. The invalidity of appellees' hypothetical statute results from the fact that "it is to the

Appellees also argue (City of N.Y. Br. 40-41; Snake River Br. 41) that cancellation under the Line Item Veto Act is properly regarded as legislative in nature because the cancellation of a tax or spending item—like an Act of Congress—is irrevocable by the President and can be overridden only by Congress itself. As we explain in our opening brief (at 41), however, the discretion conferred on the President by the Line Item Veto Act is plainly *narrower* than would be the case if the President were authorized to revoke a cancellation after it had been made. Nothing in logic or in this Court's decisions supports the view that Congress is forbidden to condition a grant of discretionary authority to the President on the requirement that it be exercised (or not) within a limited period of time, or that it be irrevocable once undertaken.[8]

President, and not to the Congress, that the Constitution entrusts the responsibility to 'take Care that the Laws be faithfully executed.'" *Buckley* v. *Valeo*, 424 U.S. 1, 138 (1976) (per curiam) (quoting U.S. Const. Art. II, § 3); see also *Bowsher* v. *Synar*, 478 U.S. 714, 733 (1986) ("once Congress makes its choice in enacting legislation, its participation ends"). The fact that cancellation authority could not constitutionally be vested in Congress hardly undermines our contention that cancellation of budget items pursuant to authority provided by Congress represents the exercise of executive power.

[8] As the *Snake River* appellees point out (at 44), Congress sometimes confers discretion upon Executive Branch officials in order to facilitate the development of federal policy in light of changing circumstances. If that were the *only* legitimate basis on which Executive Branch officials could be permitted to exercise significant discretion, there might be force to the argument that the irrevocable nature of the President's cancellation authority renders it problematic. This Court has recognized, however, that Congress may vest discretion in the Executive Branch for a variety of reasons, some of which have nothing to do with the possibility that relevant conditions will change over time. See, *e.g.*, *Chevron*, 467 U.S. at 865 (Executive Branch officials may appropriately be vested with "policymaking responsibilities" where "Congress [i]s unable to forge a coalition on either side of the question, and those on each side decide[] to take their chances with the agency").

At bottom, appellees' argument reduces to the proposition that federal government action is necessarily legislative in character if it resembles action that Congress itself might take. "This Court established long ago," however, "that Congress must be permitted to delegate to others at least some authority that it could exercise itself." *Loving* v. *United States*, 116 S. Ct. 1737, 1744 (1996). Thus, while the definition of federal criminal offenses is typically performed by Congress, the Court has "upheld delegations whereby the Executive or an independent agency defines by regulation what conduct will be criminal." *Id.* at 1748. The Court in *Loving* held that Congress had permissibly vested in the President the authority to promulgate rules for the imposition of capital punishment within the armed forces, see *id.* at 1748-1749—a task obviously similar to the function performed by Congress with respect to civilian offenders, compare 18 U.S.C. 3591-3598. See also, *e.g.*, *Chadha*, 462 U.S. at 953 n.16 ("some administrative agency action—rulemaking, for example—may resemble 'lawmaking'"). So long as the Line Item Veto Act satisfies the standards applicable to statutory grants of power to the Executive Branch, the fact that a presidential cancellation may share one of the attributes of legislative action provides no basis for invalidating the Act.

The *Snake River* appellees also suggest that the Line Item Veto Act need not be tested against the standards governing grants of discretionary administrative authority because Congress did not actually conceive of the President's cancellation power in those terms. See Br. 40 ("the Act's title and its mimicry of the veto power * * * surely show that what Congress thought it was doing was giving the President a unilateral power to shape the law

itself, not merely to implement it"). This will not do.[9] "When any Branch [of the federal government] acts, it is presumptively exercising the power the Constitution has delegated to it. When the Executive acts, he presumptively acts in an executive or administrative capacity as defined in Art. II." *Chadha*, 462 U.S. at 951 (citation omitted). And "[w]hen the President acts pursuant to an express or implied authorization from Congress," his actions are "supported by the strongest of presumptions and the widest latitude of judicial interpretation." *Dames & Moore* v. *Regan*, 453 U.S. 654, 668 (1981) (internal quotation marks omitted). If the Line Item Veto Act satisfies the substantive standards applicable to legislative grants of discretionary administrative authority, appellees' speculation that Congress misunderstood the constitutional basis for the Act provides no ground for holding the Act invalid.[10]

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[9] The respect due a coordinate Branch is a sufficient basis for rejecting appellees' unsupported assertion that Congress set out to confer legislative authority upon the President. We note as well, however, that appellees' contention is belied by the Act's legislative history. The Conference Report states:

> The conferees note that while the conference report delegates new powers to the President, these powers are narrowly defined and provided within specific limits. The conference report includes specific definitions, carefully delineates the President's cancellation authority, and provides specific limits on this cancellation authority. The delegation of this cancellation authority is not separable from the President's duties to comply with these restrictions.

H.R. Conf. Rep. No. 491, 104th Cong., 2d Sess. 19 (1996).

[10] Appellees also suggest (City of N.Y. Br. 38-39 n.26; Snake River Br. 45) that cancellation under the Line Item Veto Act cannot truly be an exercise of executive power because it is not subject to any judicial check. In our view, a court may determine whether a cancelled budgetary item is properly subject to cancellation under the Act—*i.e.*, whether it falls within the statutory definition of "dollar amount of discretionary budget authority," "item of new direct spending," or "limited tax benefit." 2 U.S.C. 691(a) (Supp. II 1996). That form of judicial review adequately ensures that the President's "administrative activity cannot reach beyond the limits of the statute that created it." *Chadha*, 462 U.S. at 953 n.16; cf. note 9, *supra*.

We do not believe that the findings contained in the President's special message (see Gov't Br. 8) are open to judicial reexamination. The absence of such review, however, is scarcely anomalous. To the contrary, executive determinations required to be made by the President personally are presumptively not subject to review for reasonableness. See *Franklin* v. *Massachusetts*, 505 U.S. 788, 801 (1992) ("We would require an express statement by Congress before assuming it intended the President's performance of his statutory duties to be reviewed for abuse of discretion."). As we noted in our opening brief (at 45-46), moreover, a subordinate Executive Branch official's allocation of funds from a lump-sum appropriation has traditionally been regarded as "committed to agency discretion" and therefore not subject to judicial review. See *Lincoln* v. *Vigil*, 508 U.S. 182, 191-192 (1993).

3. Finally, appellees contend (Snake River Br. 45-48; City of N.Y. Br. 37-39) that the Act fails to place constitutionally sufficient constraints on the President's discretion, and that it is therefore invalid even under the standards applicable to statutory grants of administrative authority. That argument is without merit.

a. The legislative practice of giving the President substantial discretion over the expenditure of appropriated funds has a 200-year pedigree. See Gov't Br. 2-5; Senate Amicus Br. 3-11.[11] On those occasions when Congress has tightened controls on Executive Branch discretion, it has

[11] The Line Item Veto Act requires that the President's special message announcing a cancellation must "specify," *inter alia*, "all facts, circumstances and considerations relating to or bearing upon the cancellation, and to the maximum extent practicable, the estimated effect of the cancellation upon the objects, purposes and programs for which the cancellation authority was provided." 2 U.S.C. 691a(b)(1)(E) (Supp. II 1996). As that language suggests, projects for which federal funds are appropriated typically do not exist in a vacuum. They are instead intended to serve the purposes of some larger government program—a program that will, in the nature of things, be administered by Executive Branch officials. The President's determination that a particular spending item is suitable for cancellation may be informed by his understanding of the larger programmatic context and by the specialized expertise of subordinate Executive Branch officials.

typically aimed at preventing overspending, not underspending. See, *e.g.*, Act of July 12, 1870, ch. 251, § 7, 16 Stat. 251 (Anti-Deficiency Act) (codified as amended at 31 U.S.C. 1341).[12] The Line Item Veto Act places far greater constraints on the President's discretion than did the lump-sum appropriations bills favored by early Congresses. See Gov't Br. 3; *Cincinnati Soap Co.* v. *United States*, 301 U.S. 308, 322 (1937) (constitutionality of lump-sum appropriations "has never been seriously questioned"). In light of Congress's repeated (and heretofore unquestioned) practice of vesting executive officials with substantial authority over the expenditure of federal funds, the Act's provisions governing the cancellation of spending items cannot be said to effect an impermissible shift in the balance of power between the Legislative and Executive Branches.[13]

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[12] The Constitution itself reflects a concern with restraining, rather than compelling, expenditures by the Executive Branch. The Appropriations Clause (Art. I, § 9, Cl. 7) prohibits the drawing of money from the Treasury except "in Consequence of Appropriations made by Law." See generally *OPM* v. *Richmond*, 496 U.S. 414 (1990). That Clause was designed in part to ensure that the Executive Branch spends no more than Congress appropriates. See *id.* at 427; *Reeside* v. *Walker*, 52 U.S. (11 How.) 271, 291 (1851). The Constitution contains no comparable provision aimed at compelling the expenditure of appropriated funds.

[13] The *City of New York* appellees assert, without explanation, that "cancellation of section 4722(c), which established as a matter of law that the disputed federal matching funds belong to New York, is precisely analogous to cancellation of a limited tax benefit, rather than an item of spending authority." City of N.Y. Br. 44. We see no basis for that assertion. By authorizing the President to cancel items of new direct spending, the Line Item Veto Act simply confers discretion over the manner in which the government's own funds will be spent. Insofar as the cancellation of discretionary budget authority (*i.e.*, appropriations) and limited tax benefits may be thought to raise distinct constitutional issues, items of new direct spending are much more closely analogous to the former.

b. The *Snake River* appellees contend (at 41 n.36) that the cancellation of Section 968 raises distinct constitutional concerns because it "has no arguable historical analog." As we explain in our opening brief, however, Congress has frequently vested the President with discretionary authority over the imposition of taxes. Gov't Br. 48; see Senate Amicus Br. 6-7; *Skinner* v. *Mid-America Pipeline Co.*, 490 U.S. 212, 221-222 (1989) (discussing historical practice). The Court has squarely held that "the delegation of discretionary authority under Congress' taxing power is subject to no constitutional scrutiny greater than that [the Court] ha[s] applied to other nondelegation challenges." *Id.* at 223. The Act's provisions governing limited tax benefits are therefore subject to the same "intelligible principle" standard (see Gov't Br. 45) that applies to other grants of discretionary administrative authority.

Applying the "intelligible principle" standard, this Court has repeatedly approved grants of discretionary authority "under [statutory] standards phrased in sweeping terms." *Loving*, 116 S. Ct. at 1750; see Gov't Br. 45. Appellees do not contend that the statutory provisions previously upheld by this Court—*e.g.*, the authorization for the Federal

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If the Court disagrees, however, and if it concludes that the Act's provisions concerning direct spending and tax benefits are invalid under the nondelegation doctrine, the Court need not and should not decide whether the provisions governing discretionary budget authority survive. That question is not presented by this case, since none of the appellees claim to have been injured by the cancellation of discretionary budget authority. See *Printz* v. *United States*, 117 S. Ct. 2365, 2384 (1997) (Court declined to decide issue of severability where plaintiffs had no concrete interest in its resolution). The government's view, however, is that the Act's provisions governing cancellation of discretionary budget authority would be "fully operative as a law," *Buckley*, 424 U.S. at 108, and would therefore remain intact even if the rest of the Act were struck down as an overly broad conferral of administrative authority. See Gov't Br. 48 n.28.

Communications Commission to regulate broadcast licensing as required by the "public interest, convenience, or necessity," *NBC* v. *United States*, 319 U.S. 190, 194, 225-226 (1943)—imposed greater constraints on Executive Branch discretion than does the Line Item Veto Act.[14] Rather, they seek to distinguish those cases on the ground that the statutes at issue "d[id] not permit the delegate to overrule or to cancel what Congress ha[d] specifically prescribed." Snake River Br. 48. That argument is simply a reprise of appellees' contention that cancellation under the Act effects an impermissible repeal of an enacted law; it should be rejected for the reasons stated at pp. 11-16, *supra*.

* * * * *

For the reasons stated above and in our opening brief, the judgment of the district court should be vacated and the case remanded with instructions to dismiss for lack of jurisdiction. Alternatively, the judgment of the district court should be reversed.

Respectfully submitted.

SETH P. WAXMAN
Solicitor General

APRIL 1998

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[14] As we explain above, moreover, see pp. 10-11 & note 5, *supra*, the President's authority to cancel limited tax benefits is more constrained than the discretion that he would possess if Congress adopted the (unquestionably constitutional) practice of enacting individual tax provisions as separate bills.

(16)

No. 97-1374

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In The

Supreme Court of the United States

October Term, 1997

WILLIAM J. CLINTON, *et al.*,

Appellants,

vs.

CITY OF NEW YORK, *et al.*,

Appellees.

ROBERT E. RUBIN,

Appellant,

vs.

SNAKE RIVER POTATO GROWERS, INC., *et al.*,

Appellees.

On Appeal from the United States District Court for the District of Columbia

SUPPLEMENTAL BRIEF FOR APPELLEES CITY OF NEW YORK, *et al.*

CHARLES J. COOPER
MICHAEL W. KIRK
DAVID H. THOMPSON
COOPER, CARVIN & ROSENTHAL, PLLC
2000 K Street, N.W.
Suite 401
Washington, D.C. 20006
(202) 822-8950

M. SEAN LAANE
ARNOLD & PORTER
555 12th Street, N.W.
Washington, D.C. 20004
(202) 942-5000

MICHAEL D. HESS
Corporation Counsel of the City of New York

LEONARD J. KOERNER*
Chief Assistant Corporation Counsel
ALAN G. KRAMS
DAVID B. GOLDIN
Assistant Corporation Counsels
New York City Law Department
100 Church Street
New York, New York 10007
(212) 788-1010

* *Counsel of Record*

(Continued)

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11PP

RICHARD FERRERI
General Counsel
District 37, American Federation of State, County & Municipal Employees
125 Barclay Street
New York, New York 10007
(212) 815-1450

PETER F. NADEL
ROSENMAN & COLIN, LLP
575 Madison Avenue
New York, New York 10022
(212) 940-7010

BASIL PATTERSON
MEYER, SUOZZI, ENGLISH & KLEIN, P.C.
Counsel for Local 1199, National Health and Human Service Employees Union
1505 Kellum Place
Mineola, New York 11501
(516) 741-6565

Attorneys for Appellees City of New York, et al.

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Pursuant to this Court's Rule 25.5, appellees City of New York, *et al.*, respectfully submit this Supplemental Brief responding to an argument made by the Solicitor General for the first time in his Reply Brief on the merits. Appellants have claimed that appellees' invocation of jurisdiction under 28 U.S.C. § 1331 in the district court failed because that statute "does not create a cause of action, much less authorize adjudication of a suit against the government absent an independent waiver of sovereign immunity." Reply Brief for the Appellants ("Reply Br.") at 3 n.1. Appellants failed to raise these arguments below, in their Jurisdictional Statement to this Court, or in their opening brief on the merits.

STATEMENT

1. Throughout the course of this litigation, appellants have argued that appellees fail to satisfy the standing requirements of Article III, claiming that appellees have not demonstrated an actual or imminent injury sufficient to confer standing. The district court fully considered and rejected appellants' Article III standing arguments, *see* J.S. App. 11a-21a, and the issue has been fully briefed in this Court in the parties' merits briefs.

2. In appellants' opening merits brief, the Government argued for the first time that most of the appellees lacked *statutory* standing because the Line Item Veto Act, 2 U.S.C. § 692(a)(1), limited its grant of jurisdiction to actions brought by "individual[s]," which the Government says includes only " 'single human being[s].' " Brief for the Appellants at 16-17. In our own brief on the merits, we responded to this new claim by demonstrating that appellants' interpretation of the term "individual" was flawed. *See* Brief for Appellees City of New York, *et al.*, at 10-11. As we also pointed out, even if appellants' statutory construction were correct, thereby depriving the district court of jurisdiction over the claims brought by the non-natural person plaintiffs pursuant to § 692(a)(1), appellees had also

invoked the district court's jurisdiction pursuant to 28 U.S.C. § 1331. *See also* J.A. 22 (City of New York complaint); *id.* at 12 (Snake River complaint).

3. Recognizing that federal question jurisdiction plainly exists in this case — our claims unquestionably "arise under the Constitution, laws, or treaties of the United States," 28 U.S.C. § 1331 — appellants once again shifted their line of attack, arguing for the first time in their reply brief that the district court's judgment should be reversed because 28 U.S.C. § 1331 (i) does not independently waive appellants' sovereign immunity, and (ii) does not "create a cause of action" other than that created by the Line Item Veto Act for "individual[s]." Reply Br. at 3 n.1. In other words, appellants have conceded that the district court had a basis for jurisdiction wholly apart from the jurisdictional grant set forth in the Line Item Veto Act. Nevertheless, they now argue that appellees have failed to overcome the previously unasserted affirmative defense of sovereign immunity, and have failed to identify "the source of substantive law upon which the claimant relies [to] provide[] an avenue for relief." *FDIC v. Meyer*, 510 U.S. 471, 484 (1994).

ARGUMENT

I.

APPELLANTS' NEW ARGUMENT CONCERNING APPELLEES' CAUSE OF ACTION IS NOT PROPERLY BEFORE THE COURT AND IS, IN ANY EVENT, WITHOUT MERIT.

1. Appellants' challenge to appellees' cause of action at this stage of the proceedings violates this Court's Rules 18.3 and 14.1(a) in that it is not fairly included within either of the questions presented in the Jurisdictional Statement. The Solicitor General sought this Court's review on two questions:

> 1. Whether the appellees in this case have standing to challenge the constitutionality of the [Line Item Veto] Act.
>
> 2. Whether the Act violates Article I of the Constitution or principles of separation of powers.

Jurisdictional Statement at I.

While appellants' statutory standing argument (based on their construction of the term "individual") arguably falls within the scope of the first question (although the Jurisdictional Statement focused exclusively upon the issue whether appellees had alleged sufficiently concrete injuries to satisfy Article III standing requirements), appellants' new assertion simply does not relate to standing. Whether or not Congress has established a cause of action entitling appellees to seek the relief awarded by the court below (beyond that established in the Line Item Veto Act) has no bearing whatever on appellees' standing to challenge the constitutionality of the Act!

2. In seeking relief from the district court, appellees invoked not only the cause of action established in the Line Item Veto Act, but also the Declaratory Judgment Act, 28 U.S.C. § 2201. *See* J.A. 22 (City of New York complaint); *id.* at 12

---

1. Likewise, whether or not appellants may interpose a sovereign immunity defense (assuming *arguendo* that the scope of the waiver of sovereign immunity set forth in the Line Item Veto Act is limited to actions brought by natural persons) is wholly unrelated to the issue of appellees' standing. We recognize, however, that sovereign immunity is by nature jurisdictional, *see FDIC v. Meyer*, 510 U.S. at 475, and that this Court will itself "notice the possible absence of jurisdiction because [the Court is] obligated to do so even when the issue is not raised by a party." *Izumi Seimitsu Kogyo Kabushiki Kaisha v. U.S. Philips Corp.*, 510 U.S. 27, 33 (1993).

(Snake River complaint).[2] This Court has previously considered suits seeking declaratory relief for allegedly unconstitutional actions taken by the President in the absence of any other statute authorizing the action. *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 583 (1952) ("The District Court was asked to declare the orders of the President and the Secretary [seizing the steel industry] invalid and to issue preliminary and permanent injunctions restraining their enforcement."); *Panama Refining Co. v. Ryan*, 293 U.S. 388, 410 (1935) (actions seeking to enjoin enforcement of executive order and regulations promulgated by the Secretary of the Interior pursuant to statute claimed to be unconstitutional). Appellants seek to divert attention from this point by arguing that review is unavailable under the Administrative Procedure Act, 5 U.S.C. § 701, *et seq.*, because there has been no "final agency action." Reply Br. at 3 n.1. The Government is correct, but only because it is settled that the President is not an "agency" whose actions are subject to APA review. *Franklin v. Massachusetts*, 505 U.S. 788, 800-01 (1992). But the Court in *Franklin* very carefully noted that "the President's actions may still be reviewed for constitutionality," *id.* at 801 (citing *Youngstown* and *Ryan*), notwithstanding the absence of APA review. *See also Dalton v. Specter*, 511 U.S. 462, 473 & n.5 (1994).

2. It is settled that the Declaratory Judgment Act establishes a cause of action by providing for "relief to be given by way of recognizing the plaintiff's right even though no immediate enforcement of it was asked." *Skelly Oil Co. v. Phillips Petroleum Co.*, 339 U.S. 667, 672-73 (1950).

II.

SOVEREIGN IMMUNITY DOES NOT SHIELD EXECUTIVE OFFICERS FROM SUITS ALLEGING THEY ACTED UNCONSTITUTIONALLY.

This Court has repeatedly made clear that "sovereign immunity would not shield an executive officer from suit if the officer acted either 'unconstitutionally *or* beyond his statutory powers.' " *Dalton*, 511 U.S. at 472 (quoting *Larson v. Domestic & Foreign Commerce Corp.*, 337 U.S. 682, 691 n.11 (1949)) (emphasis added by *Dalton* Court). As the Court explained in *Larson*:

> There may be, of course, suits for specific relief against officers of the sovereign which are not suits against the sovereign. . . . A second type of case is that in which the statute or order conferring power upon the officer to take action in the sovereign's name is claimed to be unconstitutional. Actions for habeas corpus against a warden and injunctions against the threatened enforcement of unconstitutional statutes are familiar examples of this type. Here, too, the conduct against which specific relief is sought is beyond the officer's powers and is, therefore, not the conduct of the sovereign. The only difference [from a case in which the officer lacks even a colorable claim of authority] is that in this case the power has been conferred in form but the grant is lacking in substance because of its constitutional invalidity.

337 U.S. at 689-90; *see also Dugan v. Rank*, 372 U.S. 609, 621-22 (1963); *Malone v. Bowdoin*, 369 U.S. 643, 647 (1962); *Scranton v. Wheeler*, 179 U.S. 141, 152-53 (1900).[3]

3. As the Court has recognized at least as far back as 1912, this (Cont'd)

The case at bar precisely fits the description set forth in *Larson*: the power conferred by the Line Item Veto Act upon the President "to take action in the sovereign's name is claimed to be unconstitutional." 337 U.S. at 690. As the Court made clear in *Dalton*, this exception applies with full force in cases where the action at issue is taken by the President, rather than a lesser executive officer. 511 U.S. at 473 & n.5 (citing *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952), and *Panama Refining Co. v. Ryan*, 293 U.S. 388 (1935), as cases in which the constitutionality of action taken by the President was reviewed notwithstanding the doctrine of sovereign immunity).[4]

(Cont'd)
"principle has frequently been applied with respect to state officers seeking to enforce unconstitutional enactments" in the context of the Court's Eleventh Amendment jurisprudence. *Philadelphia Co. v. Stimson*, 223 U.S. 605, 620 (1912) (citing, *inter alia*, *Ex Parte Young*, 209 U.S. 123, 159 (1908)).

4. In *Dalton*, the Court held that the President's actions were not reviewable because the sole claim in that case was that the President's actions exceeded his statutory authority, and the Court held that this alone did not, as the court below had held, create a claim that the presidential action was "*ipso facto* in violation of the Constitution." 511 U.S. at 463. It was in this context that the Court carefully distinguished *Larson*, *Youngstown*, and *Ryan* as cases in which sovereign immunity did not attach in light of "our specifying unconstitutional and ultra vires conduct as separate categories." *Id.* at 472. The Court went on to reject the claim that the President's action exceeded his statutory authority on the ground that the statute in question committed the matter to his discretion. *Id.* at 476-77.

CONCLUSION

For the foregoing reasons, and those stated in our brief on the merits, the judgment of the district court should be affirmed.

Respectfully submitted,

CHARLES J. COOPER
MICHAEL W. KIRK
DAVID H. THOMPSON
COOPER, CARVIN
& ROSENTHAL, PLLC
2000 K Street, N.W.
Suite 401
Washington, D.C. 20006
(202) 822-8950

M. SEAN LAANE
ARNOLD & PORTER
555 12th Street, N.W.
Washington, D.C. 20004
(202) 942-5000

RICHARD FERRERI
General Counsel
District 37, American Federation of State, County & Municipal Employees
125 Barclay Street
New York, New York 10007
(212) 815-1450

MICHAEL D. HESS
Corporation Counsel of the City of New York

LEONARD J. KOERNER*
Chief Assistant Corporation Counsel
ALAN G. KRAMS
DAVID B. GOLDIN
Assistant Corporation Counsels
New York City Law Department
100 Church Street
New York, New York 10007
(212) 788-1010

PETER F. NADEL
ROSENMAN & COLIN, LLP
575 Madison Avenue
New York, New York 10022
(212) 940-7010

BASIL PATTERSON
MEYER, SUOZZI, ENGLISH
& KLEIN, P.C.
Counsel for Local 1199, National Health and Human Service Employees Union
1505 Kellum Place
Mineola, New York 11501
(516) 741-6565

* *Counsel of Record*

Attorneys for Appellees
City of New York, et al.

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OCTOBER TERM, 1997

WILLIAM J. CLINTON, ET AL., APPELLANTS,

v.

CITY OF NEW YORK, ET AL.

ROBERT E. RUBIN, APPELLANT,

v.

SNAKE RIVER POTATO GROWERS, INC., ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

BRIEF OF THE UNITED STATES SENATE AS AMICUS CURIAE FOR REVERSAL

THOMAS B. GRIFFITH,
(Counsel of Record),
Senate Legal Counsel,
MORGAN J. FRANKEL,
Deputy Senate Legal Counsel,
STEVEN F. HUEFNER,
A. CHRISTOPHER BRYANT,
Assistant Senate Legal Counsel,
Office of Senate Legal Counsel,
642 Hart Senate Office Building,
Washington, D.C. 20510.
(202) 224–4435
Counsel for the United States Senate

MARCH 1998.

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Clinton's Line-Item Vetoes Show Light Touch, CQ Monitor, Dec. 8, 1997 17

BRIEF OF THE UNITED STATES SENATE AS AMICUS CURIAE FOR REVERSAL

INTEREST OF AMICUS

In 1996, Congress enacted the Line Item Veto Act, Pub. L. No. 104–130, 110 Stat. 1200 (1996) (2 U.S.C. §§ 691 *et seq.* (Supp. II 1996)), as an extension of the Impoundment Control Act of 1974, which established procedures for the President to defer or rescind previously enacted appropriations. Despite its name, the Line Item Veto Act does not give the President authority to veto items in proposed legislation. Rather, through 2004, the Act enhances the President's authority to rescind from enacted laws certain items of spending and taxation, subject to Congress's ultimate control. The district court agreed with appellees that this authority allows the President to repeal laws without action by Congress, violating Article I and the separation of powers. J.S. App. at 22a–31a. This appearance as amicus curiae presents the Senate's view that the Act comports with the Constitution's lawmaking processes and the separation of powers doctrine against undue Executive delegations.[1]

SUMMARY OF ARGUMENT

I. Congress's delegation to the President of authority to cancel items of spending and limited tax benefits builds upon a long history of delegation of control over raising and spending federal funds. From the first appropriation laws enacted under the Constitution, which set ceilings on Executive spending, Congress has repeatedly appropriated funds without mandating that all available funds

[1] Title 2 U.S.C. § 288e authorizes the Senate to direct its Legal Counsel to appear as amicus curiae in its name "in any court of the United States . . . in which the powers and responsibilities of Congress under the Constitution . . . are placed in issue." *See* S. Res. 152, 105th Cong. (1997), 143 Cong. Rec. S12422 (daily ed. Nov. 9, 1997) (directing Senate appearance in this case). Permission to appear is "of right" and may be denied only for untimeliness. 2 U.S.C. § 288*l*(a). The Senate expresses no view on the standing issues in this appeal.

be spent. Similarly, Congress has often imposed taxes while giving the Executive limited discretion to repeal, suspend, or discontinue them. In addition, Congress has given the Executive broad authority to transfer, reduce, or withhold spending for purposes of economy and management and for fiscal or policy reasons. When disputes have arisen over whether the Executive could withhold particular funds, all three branches have understood that the issue of how much discretion the Executive has over the federal budget is a legislative question subject to Congress's determination. In the Line Item Veto Act, Congress determined, after two decades of persistent budget deficits, to give the President temporary authority to cancel specific deficit-increasing items.

II. The cancellation authority exercised in these cases does not give the President lawmaking power contrary to Article I, for his sole authority under the Line Item Veto Act remains to execute the laws in fulfillment of Congress's deficit-reduction policy. The Act fully comports with Article I's bicameralism and presentment requirements, as both the Act itself and all laws subject to the Act will have been passed by both Houses and signed by the President. The President's approval of a measure subject to the Act, in accordance with the Presentment Clause, completes the lawmaking process, for at that moment all three legislative actors have then agreed to make the measure's spending or revenue items permissive. Subsequent Executive cancellations do not effect repeals in violation of Article I, but implement a duly enacted statute in conformance with Congress's will. *See INS v. Chadha*, 462 U.S. 919, 953 n.16 (1983).

The constitutional question presented by the Act is the Article II question whether Congress has vested undue discretion in the President. This Court has established that delegation of the taxing and spending power is subject to no greater constitutional scrutiny than other delegations. *Skinner v. Mid-America Pipeline Co.*, 490 U.S. 212, 223 (1989). The district court erroneously concluded that the cancellation authority was nondelegable because

the President may make permanent changes to spending and tax provisions. Yet the Court has specifically upheld delegations of irreversible authority to alter the force of revenue laws since 1813. *See Field v. Clark*, 143 U.S. 649, 682–83 (1892) (citing *The Brig Aurora*, 11 U.S. (7 Cranch) 382, 388 (1813)). A variety of prior delegations have likewise authorized the President permanently to nullify spending provisions.

The Act's cancellation authority respects Article II's limits on delegation because Congress has prescribed deficit reduction as "'an intelligible principle,'" *Mistretta v. United States*, 488 U.S. 361, 372 (1989) (quoting *J.W. Hampton, Jr., & Co. v. United States*, 276 U.S. 394, 409 (1928)), to guide the President's discretion. Further, Congress has meaningfully constrained the President's discretion through a panoply of limitations and requirements easily more detailed than those accompanying previously sustained delegations.

ARGUMENT

I. THE LINE ITEM VETO ACT BUILDS ON A LONG HISTORY OF DELEGATIONS OF DISCRETION OVER TAXING AND SPENDING

Congress's delegation of authority to cancel taxing and spending builds on two centuries of delegation of discretionary control over revenues and appropriations.

A. Since 1789, Congress Has Given the Executive Discretion Over the Expenditure of Appropriated Funds

"No Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law." Art. I, §9, cl. 7. From its initial exercise of the spending power, Congress has acted upon its understanding that, while the Appropriations Clause prohibits federal expenditures in the absence of a congressional appropriation, appropriations need not compel expenditure of the appropriated funds. Instead, Congress may make an appropriation permissive.

Congress's first appropriation law, funding the original Executive departments, delegated significant discretion not to spend appropriated funds, by appropriating:

> A sum *not exceeding* two hundred and sixteen thousand dollars for defraying the expenses of the civil list, under the late and present government [and] a sum *not exceeding* one hundred and thirty-seven thousand dollars for defraying the expenses of the department of war.

Act of Sept. 29, 1789, ch. 23, §1, 1 Stat. 95 (emphasis added). The next year Congress funded much of the government under similarly flexible appropriations "not exceeding" specified amounts, in one case granting the President unbridled discretion "to draw from the treasury a sum not exceeding ten thousand dollars, for the purpose of defraying the contingent charges of government." Act of Mar. 26, 1790, ch. 4, §§1, 3, 1 Stat. 104, 105. That Congress intended these laws to confer discretion to spend less than the sum appropriated is evident by contrasting them with a contemporaneous provision directing that "payment of the following sums . . . is hereby authorized *and intended to be made.*" *Id.*, §5, 1 Stat. 105 (emphasis added). By appropriating funds "not exceeding" a fixed amount, early Congresses manifested their constitutional authority to give the Executive discretion to spend funds within whatever range Congress set by law.[2]

In the early 1800s, as the Nation's needs rapidly expanded, Congress delegated more flexibility over spending. In 1803, Congress appropriated $50,000 for the President to build "not exceeding fifteen gun boats . . . for such purposes as in his opinion the public service may require." Act of Feb. 28, 1803, ch. 11, §3, 2 Stat. 206. President Jefferson determined that the "favorable and peaceable turn of affairs on the Mississippi" brought about by the Louisiana Purchase and reopening of the Port of New Orleans had mitigated need for the vessels, and he reserved the funds until the following year. 13 Annals of Cong. 14 (1803); *see* 14 Annals of Cong. 13–14 (1804); *see also* 1 *Messages and Papers of the Presidents* 382–83, 405, 421 (James D. Richardson, ed., 1897) (Jefferson returning other unused funds).

Congress also early began delegating significant spending discretion by authorizing transfers between appropriation accounts. In 1809, Congress authorized the President, "if in his opinion necessary for the public service," to transfer appropriations within a department during a congressional recess. Act of Mar. 3, 1809, ch. 28, §1, 2 Stat. 535, 535–36. In 1820, Congress broadened this authorization to give the President discretion to transfer appropriations of the War and Navy Departments at any time.[3]

As early as 1793, Treasury Secretary Alexander Hamilton's execution of an appropriation had prompted a congressional debate whether, in James Madison's words, the Executive had an inherent constitutional "discretion to be implied in the trust of executing the laws" to "apply the

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[2] In the third annual appropriation law, Congress not only continued to give the Executive discretion by erecting spending ceilings for much of the government, Act of Feb. 11, 1791, ch. 6, §1, 1 Stat. 190, but also confirmed that it intended the Executive to use that discretion, by validating the Executive's past expenditure of less than the appropriated levels: sums appropriated were to be drawn in part from "such surpluses as may remain in the treasury, after satisfying the purposes for which appropriations were made, by the [two prior appropriation acts]." *Id.*

[3] *See* Act of May 1, 1820, ch. 52, §5, 3 Stat. 567, 568. Congress continued to allow transfers of appropriations until 1868 (*see* Act of June 30, 1834, ch. 171, 4 Stat. 742; Act of July 2, 1836, ch. 268, §2, 5 Stat. 77, 78–79; Act of Aug. 26, 1842, ch. 202, §23, 5 Stat. 523, 533), when it repealed all such authority and provided that "no money appropriated for one purpose shall hereafter be used for any other purpose." Act of Feb. 12, 1868, ch. 8, §2, 15 Stat. 35, 36. This century, Congress has again permitted appropriation transfers. *See, e.g.*, Act of June 30, 1932, ch. 314, §317, 47 Stat. 382, 411 (authorizing transfer of up to 12% of appropriation within department); Department of Defense Appropriations Act, 1998, Pub. L. No. 105–56, §8005, 111 Stat. 1203, 1220 (1997) (authorizing conditional transfer of up to $2 billion); Departments of Labor, Health and Human Services, and Education Appropriations Act, 1998, Pub. L. No. 105–78, §304, 111 Stat. 1467, 1505 (1997) (authorizing conditional transfer).

excess of one fund to the aid of a deficient one," or whether such action depended on "special permission of the law" appropriating the funds. 3 Annals of Cong. 938 (1793). Notably lacking from this debate was any suggestion that the Constitution forbade giving the President "special permission" to shift appropriations.

Recognition of Congress's authority to delegate discretion over spending persisted through the 19th century. In 1896, for example, Congress authorized the Secretary of War to expend "not exceeding fifty thousand dollars, or so much thereof as may be necessary," to improve the Mississippi River channel and bank. Act of June 3, 1896, ch. 314, 29 Stat. 202, 229. Attorney General Harmon advised the Secretary "that the permissive form was here used with the deliberate intention of leaving to your judgment the question whether any of the sum named should be expended; and if so, how much." 21 Op. Att'y Gen. 391, 392 (1896). The Attorney General instructed the Secretary "to proceed with the expenditure authorized if, in your judgment, an improvement of that condition may fairly be expected to result. Otherwise you are left at liberty to leave the appropriation unexpended."[4]

B. Grants to the Executive of Discretionary Authority Over Revenue Measures Also Date to the Early Nineteenth Century

Congressional delegations of authority to nullify tax provisions have a similarly long historical pedigree. As early as 1815, Congress authorized the President to repeal various import duty provisions, "[s]uch repeal to take effect in favour of any foreign nation, whenever the President of the United States shall be satisfied that the discriminating or countervailing duties of such foreign nation, so far as they operate to the disadvantage of the United States, have been abolished." Act of Mar. 3, 1815, ch. 77, 3 Stat. 224. Using this authority President Monroe

[4] *Id.*; *see also* 21 Op. Att'y Gen. 414, 415–16 (1896) (same); *compare* 22 Op. Att'y Gen. 295, 297 (1899) (construing another appropriation as mandatory).

issued five proclamations declaring that the statutory duties on imports from a particular nation "are repealed." 3 Stat. app. 1, procl. 3–7 (1818–21).

In 1824 and 1828, Congress authorized the President to "suspend[ ] and discontinue[ ]" statutory duties on foreign vessels, provided he was satisfied that the foreign nation was not imposing discriminating duties on U.S. vessels.[5] In 1830, Congress again enacted a law directing that statutory provisions imposing duties on foreign vessels "shall be repealed: *Provided*, That the President" found that the foreign nation's duties had been abolished. Act of May 31, 1830, ch. 219, § 2, 4 Stat. 425, 425. As customs duties then generated more than 85% of all revenue, *see* Bureau of the Census, U.S. Dep't of Commerce, *Historical Statistics of the United States: Colonial Times to 1970*, H.R. Doc. No. 93–78, pt. 2, at 1106, tables Y 352–53 (1975), Congress had given the President substantial control over the Nation's revenue laws.

Congress has also long delegated authority to impose taxes. In 1890, Congress identified commodities for duty-free import, but gave the President "the power and . . . duty to suspend, by proclamation . . . for such time as he shall deem just" the duty-free provisions on imports from any country imposing "reciprocally unequal and unreasonable" duties. McKinley Tariff Act of 1890, ch. 1244, § 3, 26 Stat. 567, 612. Similar delegations continued this century.[6]

[5] Act of Jan. 7, 1824, ch. 4, § 4, 4 Stat. 2, 3; Act of May 24, 1828, ch. 111, 4 Stat. 308. Pursuant to these and similar delegations, eleven Presidents issued proclamations suspending duties for many countries over sixty years. *See* 4 Stat. app. 815 (1828) (Adams); 4 Stat. app. 814, 814–15, 816 (1829–30) (Jackson); 11 Stat. app. 781, 782 (1835–36) (Jackson); 9 Stat. app. 1001 (1847) (Polk); 9 Stat. app. 1004 (1850) (Fillmore); 11 Stat. app. 795 (1858) (Buchanan); 13 Stat. app. 739 (1863) (Lincoln); 14 Stat. app. 818, 819 (1866–67) (Johnson); 16 Stat. app. 1127, 1130, 1137 (1869–71) (Grant); 17 Stat. app. 954, 956, 957 (1871–72) (Grant); 21 Stat. 800 (1880) (Hayes); 23 Stat. 835 (1884) (Arthur); 24 Stat. 1030 (1886) (Cleveland).

[6] *E.g.*, Act of Aug. 5, 1909, ch. 6, § 2, 36 Stat. 11, 82–83; Flexible Tariff Act of 1922, ch. 356, § 315(a), 42 Stat. 858, 941–42.

C. Since 1905, Congress Has Periodically Given the Executive Broader Spending Discretion to Help Achieve Congress's Budget Goals

As the growth of the federal budget led to increased governmental responsibility for managing the economy through fiscal policy, Congress began giving the Executive broader spending discretion, to help achieve Congress's overall budget goals. Congress first granted general authority over spending to facilitate adherence to mandated spending limits. As early as 1870, Congress had sought to enforce appropriation ceilings through the Antideficiency Act, which made it unlawful "to expend in any one fiscal year any sum in excess of appropriations." Act of July 12, 1870, ch. 251, § 7, 16 Stat. 230, 251. Three decades later, Congress recognized that sound management required Executive control over the pace of spending. Accordingly, Congress amended the Antideficiency Act to authorize agencies regularly to apportion appropriations, to avoid the need for deficiency appropriations late in the year. Act of Mar. 3, 1905, ch. 1484, § 4, 33 Stat. 1214, 1257–58. This across-the-board measure granted Executive agencies a measure of control throughout the budget.

Fifteen years later, the first Director of the Bureau of the Budget, acting under the new Budget and Accounting Act of 1921, ch. 18, 42 Stat. 20, directed departments to treat appropriations as spending ceilings and to establish "General Reserves" by saving unnecessary expenditures. *See* U.S. Bureau of the Budget, *Circulars*, "First Budget Regulations," Budget Circular No. 4 (July 1, 1921). President Harding affirmed that Congress intended appropriations as an upper spending limit, and that to effect savings a "reasonable reserve" should be set aside from each appropriation. *See* Henry P. Seidemann, *The Preparation of the National Budget*, 113 Annals Am. Acad. Pol. & Soc. Sci. 40, 43 (1924).

Similarly, President Roosevelt explained during World War II that agencies should use "good management and

the practice of commonsense economy" to create reserves, while recognizing that Congress had delegated no general authority to withhold funds as "a substitute for item or blanket veto power."[7] Congress met the need for Executive flexibility by delegating selective authority to withhold funds. For example, Congress authorized withholding highway funds if "the War Production Board shall certify that the use of critical material for additional highway construction would impede the conduct of the war." Act of July 13, 1943, ch. 236, § 9, 57 Stat. 560, 563. Then-Senator Harry Truman observed,

> When the Congress appropriates funds it gives the executive branch an authority to incur obligations. Certainly none of us hold that we give a mandate to expend the funds appropriated. We expect the funds to be used only where needed, and not in excess of the amount appropriated, to carry out some phase of law.

89 Cong. Rec. 10362 (1943). At the end of the War, then-President Truman followed this principle in declining to spend funds appropriated for veterans hospitals until veterans had returned, so the hospitals could be built where they settled.[8]

In 1950 Congress again amended the Antideficiency Act to enlarge Executive fiscal control. Congress provided: "In apportioning any appropriation, reserves may be established to provide for contingencies, or to effect savings whenever savings are made possible by or through changes in requirements, greater efficiency of operations, or other developments subsequent to the [appropriation]." Act of Sept. 6, 1950, ch. 896, § 1211, 64 Stat. 595, 765–

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[7] Letter from President Roosevelt to Senator Russell (Aug. 18, 1942), *reprinted in part in First Supplemental National Defense Appropriation Bill for 1944: Hearings on H.R. 3598 Before a Subcomm. of the Senate Comm. on Appropriations*, 78th Cong., 1st Sess. 739 (1943).

[8] *See Executive Impoundment of Appropriated Funds: Hearings Before the Subcomm. on Separation of Powers of the Senate Comm. on the Judiciary*, 92d Cong., 1st Sess. 84–85 (1971) (testimony of William J. Driver, former Administrator of Veterans' Affairs); 1945 Pub. Papers 238.

66. The Executive was to recommend rescission of reserves not required "to carry out the purposes of the appropriation." *Id.*, 64 Stat. 766.

In proposing this revision, the House Appropriations Committee stated that Congress "decides the maximum amounts which must be appropriated for . . . various activities" and that "[a]ppropriation of a given amount for a particular activity constitutes only a ceiling upon the amount which should be expended for that activity." H.R. Rep. No. 81–1797, at 9 (1950). The Executive was responsible "for rendering all necessary service with the smallest amount possible within the ceiling." *Id.* Acting Attorney General Ramsey Clark later called this description "[t]he classic exposition" of a key appropriations law principle: "an appropriation act in itself does not constitute a mandate to spend." 42 Op. Att'y Gen. 347, 350 (1967).

The 1950 appropriation law also authorized Executive control of spending to serve Congress's broad policy goals: Congress directed the Executive to use the Antideficiency Act's reserve authority to reduce total spending by at least $550 million below appropriations, so long as the reductions did not "impair[ ] national defense." Act of Sept. 6, 1950, ch. 896, § 1214, 64 Stat. 768. In compliance, President Truman reserved and recommended rescinding funds for 150 separate items. H.R. Doc. No. 82–182, at 3–8 (1951).

As a yet stronger tool for reducing expenditures, on a number of occasions Congress has given the Executive express authority to override Congress's spending decisions and cancel appropriations. Congress's first such delegation came through broad authority to reorganize the Executive branch. In 1933, Congress gave the President latitude, subject only to a report-and-wait requirement, permanently to abolish, consolidate, or transfer Executive agencies and functions, with appropriations savings to be "impounded and returned to the Treasury." Act of Mar. 3, 1933, ch. 212, § 16, 47 Stat. 1489, 1517–19. President Roosevelt canceled more than $25 million of appropriations, roughly one-half of one percent of total federal

spending. *See* 1933 Pub. Papers 222–25; 77 Cong. Rec. 5707–08 (1933); Bureau of the Census, *supra* p. 7, at 1123, table Y 590. In 1939, in order "to reduce substantially government expenditures" in response to "continued national deficits beginning in 1931," Congress delegated to the President similar reorganization authority (súbject to legislative veto). Reorganization Act of 1939, ch. 36, § 1, 53 Stat. 561, 561. Over the next forty years, Presidents used similar authority[9] to create agencies such as the Department of Health, Education, and Welfare and the Environmental Protection Agency, using other agencies' appropriations.[10]

During the 1960s, when Vietnam War expenditures and domestic needs created a fiscal crisis, Congress delegated even greater spending control to the President, in the form of annual spending ceilings. Beginning with fiscal year 1969, Congress enacted statutory limits requiring the Executive to hold total spending and new obligations below appropriated levels by $6 billion and $10 billion, respectively. Revenue and Expenditure Control Act of 1968, Pub. L. No. 90–364, §§ 202–203, 82 Stat. 251, 271–72. To achieve the reductions, Congress authorized the President unilaterally to reduce or eliminate spending items as he saw fit, excepting only four categories (the Vietnam War, debt service, veterans' and social security benefits). *Id.* Congress provided that the amounts the President reserved "are hereby rescinded." *Id.*, § 203(b), 82 Stat. 272. The President saved billions of dollars with this authority.[11]

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[9] *E.g.*, Reorganization Act of 1945, ch. 582, 59 Stat. 613; Reorganization Act of 1949, ch. 226, 63 Stat. 203; Pub. L. No. 89–554, 80 Stat. 378, 394–98 (1966); *see* 5 U.S.C. § 905, historical and revision notes.

[10] *See* Reorg. Plan No. 1 of 1953, *reprinted in* 67 Stat. 631–32; Reorg. Plan No. 3 of 1970, *reprinted in* 84 Stat. 2086–89.

[11] *See* 115 Cong. Rec. 21277–78 (1969). Congress gave the President similar authority the two succeeding years. Pub. L. No. 91–47, § 401, 83 Stat. 49, 82–83 (1969); Pub. L. No. 91–305, §§ 401, 501, 84 Stat. 376, 405–07 (1970).

D. On Occasion, the Executive Branch Has Sought to Exercise Greater Spending Control Than Congress Had Granted

Congress's refusal to give the President similar discretion after 1971 set the stage for conflict over the President's authority to decline to spend appropriated funds. In addressing these conflicts, all three branches manifested their understanding that the issue of how much discretion the Executive has over expenditures is a legislative matter for Congress to determine in exercising its appropriation power.

Episodic disputes over Executive non-spending had surfaced from the mid-1800s. In 1861, Senator Stephen Douglas had objected to President Buchanan's failure to implement an appropriation to build a custom-house in Springfield, Illinois, complaining that "a hostile Executive" had "refused to obey the law." Cong. Globe, 36th Cong., 2d Sess. 1177 (1861). President Grant threatened in 1876 to disregard provisions in a rivers and harbors appropriation law, declaring that he would refuse to spend money appropriated "for works of purely private or local interest." 9 *Messages and Papers of the Presidents* 4331. He justified his refusal by asserting that these appropriations were not obligatory. *Id.*

The issue of presidential authority over appropriations came to a head under President Nixon. In 1969, his Administration considered withholding educational grants on the theory that the President had inherent constitutional authority to refuse to spend appropriated funds. The Justice Department's Office of Legal Counsel rejected this theory: "[W]e conclude that the President does not have a constitutional right to impound [ ] funds notwithstanding a Congressional direction that they be spent."[12]

[12] Memorandum of Ass't Att'y Gen. William H. Rehnquist, Re Presidential Authority to Impound Funds Appropriated for Assistance to Federally Impacted Schools (Dec. 1, 1969), *reprinted in Executive Impoundment of Appropriated Funds: Hearings Before the Subcomm. on Separation of Powers of the Senate Comm. on the Judiciary*, 92d Cong., 1st Sess. 279, 282 (1971) [hereinafter OLC Memo.].

While agreeing with Acting Attorney General Clark "that an appropriation act permits but does not require the executive branch to spend funds," the Office of Legal Counsel opined that "this is basically a rule of construction," subservient to Congress's will for each appropriation: Whether the Executive has discretion over a particular spending measure is an issue solely of congressional intent, and the President has whatever discretion Congress has given. *Id.*

In the years following, Congress determined not to give the President the discretion it had given in prior annual spending ceilings. Nevertheless, the Nixon Administration embarked on an ambitious course of spending cuts, impounding funds for a wide variety of programs, notwithstanding the Office of Legal Counsel opinion. As a result, in the early 1970s courts in scores of cases were required to decide whether the Executive had the authority it asserted not to spend appropriated funds.

To resolve these cases, the courts uniformly looked to Congress's intent, upholding Executive refusals to spend if Congress had conferred such discretion, but otherwise invalidating impoundments and ordering funds released. In *Train v. City of New York*, 420 U.S. 35 (1975), this Court interpreted a statutory mandate that sums authorized for sewage facilities "shall be allotted," *id.* at 42, to require the Executive to release all funds. Rejecting the Executive's claim that Congress had legislated "a maximum, but no minimum," *id.* at 43, the Court made no suggestion that, had Congress delegated such "limitless power to withhold funds from allotment and obligation," *id.* at 46, this would have been constitutionally improper. Nor did the Court need to construe this delegation "narrowly to avoid constitutional problems." *National Cable Television Ass'n v. United States*, 415 U.S. 336, 342 (1974); *see Industrial Union Dep't v. American Petroleum Inst.*, 448 U.S. 607, 646 (1980) (opinion of Stevens, J.). Rather, the Court simply interpreted the statute to conclude that Congress had conferred no such discretion. *Train*, 420 U.S. at 42–49. Lower courts similarly resolved

scores of cases without a hint that such delegations presented any issue other than statutory construction, consistently recognizing that the Executive had as much or as little authority to withhold appropriated funds as Congress had granted.[13]

E. Congress Legislated Firm Controls on Executive Spending Discretion in the Impoundment Control Act

The frequency with which the Nixon Administration withheld funds that Congress had intended be spent led Congress to enact the Impoundment Control Act of 1974 ("ICA"), Pub. L. No. 93–344, tit. X, 88 Stat. 332 (codified as amended at 2 U.S.C. §§ 681–688), to ensure that the Executive would withhold only appropriations intended as permissive. Congress sought to control two forms of impoundments: deferrals, or spending delays during a fiscal year, and rescissions, or permanent withholdings of appropriated funds. *Id.*, §§ 1011–1013, 88 Stat. 333–35. Congress authorized Executive deferrals, upon reporting to Congress and subject to legislative veto, *id.*, § 1013, 88 Stat. 334–35, but permitted the President only to propose rescissions, to be effective only if Congress affirmatively approved, using expedited procedures, *id.*, § 1017, 88 Stat. 337–39.

After invalidation of the legislative veto, *INS v. Chadha*, 462 U.S. 919 (1983), the Executive began to use deferrals aggressively on the view that severance of the legislative veto left the President with expanded deferral authority, subject to disapproval only through enactment

[13] *See, e.g., State Highway Comm'n v. Volpe*, 479 F.2d 1099, 1109–14 (8th Cir. 1973); *Pennsylvania v. Weinberger*, 367 F. Supp. 1378, 1381–82 (D.D.C. 1973); *Pealo v. Farmers Home Admin.*, 361 F. Supp. 1320, 1323–24 (D.D.C. 1973); *Minnesota v. Weinberger*, 359 F. Supp. 789, 791 (D. Minn. 1973); *Local 2677, A.F.G.E. v. Phillips*, 358 F. Supp. 60, 75–79 (D.D.C. 1973). In the one case in which the D.C. Circuit found that Congress *had* authorized the Executive to withhold appropriated funds, the court evidenced no concern that such discretion raised a constitutional issue. *Pennsylvania v. Lynn*, 501 F.2d 848 (D.C. Cir. 1974).

of a new law. The District of Columbia Circuit rejected this view and struck the entire deferral mechanism, finding the legislative veto inseverable. *City of New Haven v. United States*, 809 F.2d 900 (D.C. Cir. 1987). In light of the loss of control by legislative veto, Congress amended the ICA to limit the Executive's deferral authority to purposes permitted by the Antideficiency Act. Pub. L. No. 100–119, § 206, 101 Stat. 754, 785–86 (1987). The amended ICA allowed deferrals only "to provide for contingencies," "to achieve savings made possible by or through changes in requirements or greater efficiency of operations," or as otherwise provided by law, and permitted the Executive only to propose rescissions. 2 U.S.C. § 684(b).

F. For Over a Decade, Congress Has Given the Executive Particular Authority Over Spending to Help Achieve Deficit Reduction

Ballooning federal deficits led Congress to fashion further tools to control spending. In 1985, Congress enacted the Gramm-Rudman-Hollings Act, authorizing the President to issue a "sequestration" order canceling, pro rata, appropriations for a broad range of programs, to meet mandated deficit targets. Balanced Budget and Emergency Deficit Control Act of 1985, Pub. L. No. 99–177, tit. II, § 252, 99 Stat. 1038, 1072–78. After this Court invalidated the Comptroller General's role in sequestration, *Bowsher v. Synar*, 478 U.S. 714 (1986), Congress amended the Act to delegate the sequestration function solely to the Executive. Balanced Budget and Emergency Deficit Control Reaffirmation Act of 1987, Pub. L. No. 100–119, tit. I, § 102, 101 Stat. 754, 754–75. When the deficit targets proved unattainable, Congress again amended the Act to replace the fixed targets with prospective annual spending limits on appropriations legislation, and budget-neutrality requirements for other legislation, enforced again through Executive sequestration. Budget Enforce-

ment Act of 1990, Pub. L. No. 101–508, tit. XIII, §§ 13101, 13111, 104 Stat. 1388–573, 1388–574 to 1388–607.

As deficits persisted, Congress considered augmenting the existing rescission and sequestration regimens. One proposal, called "expedited rescission," was to amend the ICA to streamline the process for Congress to approve proposed rescissions. *See, e.g.*, H.R. 2164, 102d Cong. (1991). An alternative, termed "enhanced rescission," was to make Executive rescissions automatic in defined circumstances, subject to congressional disapproval. *See, e.g.*, S. 206, 104th Cong. (1995); H.R. 78, 102d Cong. (1991). Other proposals included amending the Constitution to give the President a line-item veto, *see, e.g.*, H.J. Res. 6, 104th Cong. (1995); H.J. Res. 4, 103d Cong. (1993), and adopting congressional procedures for presenting each spending provision to the President for approval or veto as a separate bill, *see, e.g.*, S. 137, 104th Cong. (1995); S. 238, 104th Cong. (1995). While these latter, more sweeping proposals did not gain a majority, support for amending the ICA grew, until in the Line Item Veto Act Congress gave the President "enhanced rescission," or cancellation, authority.

The President first exercised authority under the Act on August 11, 1997, when he canceled three provisions, including the two now at issue: section 4722(c) of the Balanced Budget Act of 1997, Pub. L. No. 105–33, 111 Stat. 251, 515, an item of "new direct spending" that would have increased federal Medicaid funding to New York; and section 968 of the Taxpayer Relief Act of 1997, Pub. L. No. 105–34, 111 Stat. 788, 895–96, a "limited tax benefit" that would have allowed owners of certain agricultural processors to defer recognition of gain on the sale of stock. The Taxpayer Relief Act specifically identified both section 968 and another tax provision canceled the same day as "limited tax benefits" subject to cancellation under the Line Item Veto Act. *See id.*, § 1701, 111 Stat. 1099, 1101.

Since August, the President used the Act to cancel seventy-eight annual appropriations items,[14] accounting for almost $500 million in federal spending.[15] Congress responded under the Act by enacting one law (over a Presidential veto) disapproving the cancellation of thirty-eight military construction spending items.[16]

II. THE LINE ITEM VETO ACT IS A CONSTITUTIONAL EXERCISE OF THE TAXING AND SPENDING POWER

Congress's grant of limited authority to cancel the effect of discrete spending and revenue provisions is consistent with the lawmaking requirements of Article I and the constitutional separation of powers, as expressed in the doctrine against undue delegation.

A. The Line Item Veto Act Respects Article I Lawmaking Requirements

"Explicit and unambiguous provisions of the Constitution prescribe and define the respective functions of the Congress and of the Executive in the legislative process." *Chadha*, 462 U.S. at 945. Article I, section 7, prescribes the two fundamental requisites for legislative action: "bicameral passage followed by presentment to the President." *Id.* at 954–55. These requirements "serve essential constitutional functions" and "represent[] the Framers' decision that the legislative power of the Federal Government be exercised in accord with a single, finely wrought and exhaustively considered, procedure." *Id.* at 951.

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[14] 62 Fed. Reg. 52452–69 (1997) (38 military construction items); *id.* at 53704–10 (14 Defense items); *id.* at 54564–68 (8 Energy items); *id.* at 59766–69 (7 VA/HUD items); *id.* at 59769–71 (3 Transportation items); *id.* at 62682–83 (2 Interior items); *id.* at 62683–86 (5 Agriculture items); *id.* at 64130 (1 Commerce, Justice, State item).

[15] *See Clinton's Line-Item Vetoes Show Light Touch*, CQ Monitor, Dec. 8, 1997, at 7. Although a significant sum, this is less than one-tenth percent of total appropriations. *Id.*

[16] Pub. L. No. 105–159, 112 Stat. 19 (1998). Proposed legislation to disapprove the two cancellations at issue here was not acted upon. *See* S. 1157, 105th Cong. (1997); H.R. 2444, 105th Cong. (1997); S. 1144, 105th Cong. (1997); H.R. 2436, 105th Cong. (1997).

Both Article I requirements have been met when the President cancels taxing or spending items pursuant to the Line Item Veto Act. The Act itself, obviously, was agreed to by both Houses and the President. Furthermore, as the district court recognized, *see* J.S. App. 24a, both the Balanced Budget Act of 1997 and the Taxpayer Relief Act of 1997 became law in compliance with Article I. Indeed, by its terms the Act's cancellation authority applies only to measures "signed into law pursuant to Article I, section 7." 2 U.S.C. §691(a) (Supp. II 1996). This limitation ensures that the President cannot use the Act to augment his "limited and qualified power to nullify proposed legislation by veto," *Chadha*, 462 U.S. at 947, which, as always, must be exercised with regard to an entire law or not at all.

Despite the Act's adherence to Article I's "[e]xplicit and unambiguous provisions," *id.* at 945, the district court believed that the Act violates Article I by permitting the President in effect to repeal or alter laws.[17] Although the *President* manifestly cannot change laws unilaterally, nothing in Article I deprives *Congress* of the power by law to authorize Executive action that may alter the effect of other laws. Indeed, in *Chadha* this Court dismissed the similar argument that allowing the Executive to exercise delegated authority, there under the Immigration and Nationality Act, "will sanction 'lawmaking by the Attorney General. . . . Why is the Attorney General exempt from submitting his proposed changes in the law to the full bicameral process?'" 462 U.S. at 953 n.16 (quoting petitioner's brief; omission in original). Noting that "some administrative agency action—rulemaking, for example—may resemble 'lawmaking,'" the Court held, "Executive

[17] The title of the "Line Item Veto Act" provides no support for this position. While "the title of a statute or section can aid in resolving an ambiguity in the legislation's text," *INS v. National Center for Immigrants' Rights*, 502 U.S. 183, 189 (1991), titles and headings do not control over statutory text and "cannot undo or limit that which the text makes plain." *Brotherhood of Railroad Trainmen v. Baltimore & O.R.R.*, 331 U.S. 519, 529 (1947).

action under legislatively delegated authority that might resemble 'legislative' action in some respects is not subject to the approval of both Houses of Congress and the President for the reason that the Constitution does not so require." *Id.* "The bicameral process is not necessary as a check on the Executive's administration of the laws because his administrative activity cannot reach beyond the limits of the statute that created it—a statute duly enacted pursuant to Art. I, §§ 1, 7." *Id.*

The President exercises the Act's cancellation authority not as an act of legislative power, but in fulfillment of his Article II duty to execute the laws. Once the President signed into law the bills at issue in these cases, he had no more lawmaking responsibilities regarding them. The legislative process was then complete, for "a bill when so signed becomes from that moment a law." *La Abra Silver Mining Co. v. United States*, 175 U.S. 423, 454 (1899). "[F]rom that moment," the President had an Article II duty to execute both the Line Item Veto Act *and* the newly enacted spending or revenue law, which Congress passed *subject to* the Line Item Veto Act. Once Congress presented, and the President signed, the bills at issue here, the constitutional value underlying the Presentment Clause—that all participants in the lawmaking process agree to precisely the same statutory text—had been achieved. The House, the Senate, and the President had agreed, understood, and intended that each spending item and identified tax benefit item in those laws be subject to cancellation, within the limits of the Act. The resulting cancellations accordingly do not implicate the "finely wrought" procedure of Article I. *Cf. Skinner v. Mid-America Pipeline Co.*, 490 U.S. 212, 221 (1989) (Article I's Origination Clause "implies nothing about the scope of Congress' power to delegate discretionary author-

ity under its taxing power once a tax bill has been properly enacted").[18]

B. The Line Item Veto Act Assigns Delegable Responsibility to the President

The constitutional principle that ensures that a delegation to the Executive respects the separation of powers is not Article I, but the delegation doctrine. As this Court explained in *Chadha,* after rejecting the claim that the Executive was legislating in violation of Article I, "[t]he constitutionality of the Attorney General's execution of the authority delegated to him by [statute] involves only a question of delegation doctrine." 462 U.S. at 953 n.16.

That the Line Item Veto Act delegates authority over taxation and spending does not alter the applicability of the delegation doctrine. In *Mid-America Pipeline,* the Court noted the long constitutional pedigree of delegations of taxing authority, 490 U.S. at 221–22 (citing *J.W. Hampton,* 276 U.S. 394, and *Field v. Clark,* 143 U.S. 649, 683–89 (1892)), and affirmed "that the delegation of discretionary authority under Congress' taxing power is subject to no constitutional scrutiny greater than that we

[18] The Act's precise operation reinforces its conformity with Article I, as the manner in which the President exercises cancellation authority differentiates this delegation from lawmaking. Under the Presentment Clause, if the President does not approve a bill, "he shall return it, with his Objections to that House in which it shall have originated, who shall enter the Objections at large on their Journal, and proceed to reconsider it." Art. I, § 7, cl. 2. In contrast, under the Line Item Veto Act, the President sends both Houses a "special message," printed not in their Journals but in the Federal Register, where administrative actions are recorded. 2 U.S.C. § 691a(c)(2) (Supp. II 1996). If Congress wishes to disapprove a cancellation, it does so not by the originating House's reconsidering the original bill presented to the President, as when overriding a veto, but by passing a fresh bill. 2 U.S.C. § 691d (Supp. II 1996). Furthermore, the actions the President takes to exercise his cancellation authority, such as searching congressional committee reports and considering the legislative history of provisions subject to cancellation, are precisely the type of Executive actions the Executive takes after signing a bill into law to implement Congress's will. *See Bowsher,* 478 U.S. at 733 ("[i]nterpreting a law . . . is the very essence of "execution" of the law").

have applied to other nondelegation challenges." *Id.* at 223.

Spending authority is equally subject to delegation. This Court has never "held *any* legislative power, much less that over appropriations, to be nondelegable due to its 'core function' status," and "[n]o constitutional provision distinguishes between 'core' and 'non-core' legislative functions." *Synar v. United States,* 626 F. Supp. 1374, 1385 (D.D.C.) (three-judge court) (per curiam), *aff'd on other grounds sub nom. Bowsher v. Synar,* 478 U.S. 714 (1986); *see Loving v. United States,* 517 U.S. 748, 116 S. Ct. 1737, 1748 (1996); *Milk Industry Foundation v. Glickman,* 132 F.3d 1467, 1473–75 (D.C. Cir. 1998) (upholding delegation under Compact Clause).

The only constitutional restriction unique to Congress's "power of the purse" is the Appropriations Clause, art. I, § 9, cl. 7, which "'means simply that no money can be paid out of the Treasury unless it has been appropriated by an act of Congress.'" *OPM v. Richmond,* 496 U.S. 414, 424 (1990) (quoting *Cincinnati Soap Co. v. United States,* 301 U.S. 308, 321 (1937)). Because the Clause "was intended as a restriction upon the disbursing authority of the Executive department," it "is without significance" when Congress has legislated spending discretion. *Cincinnati Soap,* 301 U.S. at 321; *accord* Joseph Story, 2 *Commentaries on the Constitution of the United States* § 922 (Fred B. Rothman & Co. 1991) (1833) ("clause is a limitation, not upon the powers of congress, but upon the acts of the executive"). The Court thus has recognized Congress's power to appropriate funds without specifying "the particular uses to which the appropriated money is to be put":

> That Congress has wide discretion in the matter of prescribing details of expenditures for which it appropriates must, of course, be plain. Appropriation and other acts of Congress are replete with instances of general appropriations of large amounts, to be allotted and expended as directed by designated government agencies. . . . The constitu-

> tionality of this delegation of authority has never been seriously questioned.[19]

The Line Item Veto Act fully satisfies the Appropriations Clause, because Congress still appropriates every penny available for spending. The President has discretion only to *decline* to spend funds that Congress *has* appropriated, not to *spend* funds Congress has *declined* to appropriate.

The Act's delegation of discretion not to spend appropriated funds is far from novel. As described in Part I, Congress has authorized the Executive to decline to spend appropriated funds since its first appropriations under the Constitution. The Justice Department has concurred that "Congress could provide in its appropriation that the money need not be spent. Or it could enact an appropriation, and then provide in contemporaneous or subsequent legislation that the money need not be spent. . . ." OLC Memo., *supra* note 12, at 282. In construing the appropriation power:

> "A legislative practice such as we have here, evidenced not by only occasional instances, but marked by the movement of a steady stream for a century and a half of time, goes a long way in the direction of proving the presence of unassailable ground for the constitutionality of the practice, to be found in the origin and history of the power involved, or in its nature, or in both combined."

Cincinnati Soap, 301 U.S. at 315 (quoting *United States v. Curtiss-Wright Export Corp.,* 299 U.S. 304, 327–28 (1936)).

Despite this long history of permissive appropriations, the district court accepted appellees' claim that the Line

[19] *Cincinnati Soap,* 301 U.S. at 321–22. Recognition of Congress's authority to give the Executive discretion through lump-sum appropriations traces from the earliest period under the Constitution, *see* 3 Annals of Cong. 889–90 (1793), to the present, *see Lincoln v. Vigil,* 508 U.S. 182, 192 (1993). For example, in 1937 Congress appropriated $1.5 billion (in addition to unexpended prior balances), roughly one-fifth of the entire federal budget at the time, "to be used in the discretion . . . of the President" for a variety of domestic projects. Emergency Relief Appropriation Act of 1937, ch. 401, tit. I, § 1, 50 Stat. 352, 353.

Item Veto Act's authority is nondelegable because it gives the President "an inherently legislative function, namely, the authority to permanently shape laws and package legislation." J.S. App. 29a. The court sought to distinguish the Act from prior delegations on the basis that cancellations cannot be reversed even if the President changes his mind, concluding that "[s]uch delegations are unprecedented." J.S. App. 30a.

The district court disregarded numerous instances in which Congress has authorized the Executive permanently to alter the force of laws. This Court has approved such delegations since 1813, when it upheld the President's authority to "revive[ ]" a law restricting foreign commerce, *which by its terms had expired,* so that it would again "have full force and effect." *The Brig Aurora,* 11 U.S. (7 Cranch) 382, 384, 388–89 (1813). Assessing this opinion in 1892, Justice Harlan noted that, facing a claim "that Congress could not transfer legislative power to the President," the Court had "deci[ded] that it was competent for Congress to make the revival of an act depend upon the proclamation of the President." *Field v. Clark,* 143 U.S. at 682–83.

At issue in *Field v. Clark* was the constitutionality of the President's authority to suspend provisions of the McKinley Tariff Act of 1890 (*see supra* p. 7). In upholding this delegation, Justice Harlan recited with approval the history since 1815 of delegations of authority to trigger not only suspensions, but also *repeals,* of tax provisions and of Presidents' uses of this authority. 143 U.S. at 685–87. As Justice Harlan observed, these precedents authorizing the President to alter the force and effect of tax laws, "from the organization of the government to the present time," are "entitled to great weight." *Id.* at 683. Three decades later, in upholding the Flexible Tariff Act of 1922, which delegated authority for the President to alter tariffs, the Court again rejected the argument that Congress cannot delegate "power to levy taxes and fix customs duties." *J.W. Hampton,* 276 U.S. at 409. While relying on these cases for the tautology that legislative

power cannot be delegated, J.S. App. 28a–29a, the district court ignored the substance of the delegations the Court approved.

Moreover, contrary to the district court's belief, Congress has also authorized the President permanently to repeal or nullify provisions of spending laws, to achieve greater fiscal economy, at least since its grant of reorganization authority in 1933, *see supra* pp. 10–11. In the 1960s, Congress authorized the President to reduce federal spending billions of dollars below appropriated levels through unilateral rescission. *See supra* p. 11. In the 1980s, the Gramm-Rudman-Hollings Act authorized the President "permanently [to] cancel[ ]" a portion of all covered appropriations. Pub. L. No. 99–177, § 252(a)(4), 99 Stat. 1074; *see supra* p. 15. In *Synar v. United States,* the three-judge district court flatly rejected the claim that this delegation was "*per se* invalid because it allows administrators to 'nullify' or 'override' laws," concluding that "the authority delegated by the Act does not differ in kind from that approved in prior cases." 626 F. Supp. at 1387.

Congress has also given this Court statutory authority effectively to repeal or nullify laws. The Rules Enabling Acts not only empower the Court to promulgate rules of practice and procedure for civil proceedings (and formerly criminal proceedings) in the lower courts, but also provide that "[a]ll laws in conflict with such rules shall be of no further force or effect." 28 U.S.C. § 2072(b) (1994) (civil); 18 U.S.C. § 3771 (1982) (repealed) (criminal). The Court has recognized that the force of these provisions is that a "prior inconsistent statute [is] *deemed to have been repealed*." *Davis v. United States,* 411 U.S. 233, 241 (1973) (emphasis added); *see also Sibbach v. Wilson & Co.,* 312 U.S. 1, 10 (1941) (explaining that Court's rules "repeal" statute).

As in each of these prior cases, Executive action pursuant to the Line Item Veto Act, although rendering canceled provisions of no legal force or effect, fulfills, rather than defeats, Congress's will. Congress has expressly legislated that each dollar amount of discretionary budget authority, each new item of direct spending, and each limited tax benefit enacted over the life of the Act (unless exempted from the Act) are to be permissive and subject to cancellation within the limits of the Act. Accordingly, the President's decisions at issue here to cancel the new direct spending provision paying New York State additional Medicaid funds, and the limited tax benefit permitting deferral of recognition of gain on certain sales of agricultural stock, do not negate Congress's legislated will, but execute Congress's delegated statutory authority.

C. The Line Item Veto Act Comports With the Doctrine Against Undue Delegation

The Line Item Veto Act serves the separation of powers through "measured cooperation between the two political branches of the Government, each contributing to a lawful objective through its own processes." *Loving,* 116 S. Ct. at 1751. Congress's delegation is "'constitutionally sufficient,'" as Congress has "'clearly delineate[d] the general policy, the public agency which is to apply it, and the boundaries of this delegated authority.'" *Mistretta v. United States,* 488 U.S. 361, 372–73 (1989) (quoting *American Power & Light Co. v. SEC,* 329 U.S. 90, 105 (1946)). Based upon its judgment about the serious economic threat of budget deficits, Congress has made all spending and tax provisions covered by the Act permissive for five days after enactment. In establishing deficit reduction as its paramount objective, Congress has fulfilled "[t]he essentials of the legislative function," *Yakus v. United States,* 321 U.S. 414, 424 (1944), by "'lay[ing] down by legislative act an intelligible principle'" to guide the President's discretion. *Mistretta,* 488 U.S. at 372 (quoting *J.W. Hampton,* 276 U.S. at 409). Because of its view that the authority delegated by the Act was nondelegable, the district court deemed it "irrelevant whether the Line Item Veto Act provides intelligible principles." J.S. App. 31a. The court thus failed to appreciate the significant constraints accompanying this delegation.

Key statutory features confine the President's discretion. He can make cancellations only during the five days after a measure is enacted, rather than throughout the year. The cancellation authority is irreversible, precluding the President from canceling funding, only to restore it later. The cancellation authority is limited to total rescission. Thus, the President is put to the difficult choice of canceling an item entirely or not at all. This "all or nothing" requirement, H.R. Conf. Rep. No. 104–491, at 32, 33 (1996), gives the President far less discretion than would, for example, a general grant of authority to reduce expenditures to any level he sees fit. Finally, to promote its legislative goal of deficit reduction, Congress enacted an intricate "lockbox" mechanism, 2 U.S.C. §691c (Supp. II 1996), under which the Office of Management and Budget must "lock in" the savings resulting from a cancellation, through adjustments in the calculations it submits to Congress under the Gramm-Rudman-Hollings Act. This lockbox requirement "ensures that the President does not simply cancel . . . in order to increase spending in other areas." H.R. Conf. Rep. No. 104–491, at 20–21.[20]

[20] Requiring the President to use his cancellation authority within five days of signing the underlying bill, 2 U.S.C. §691(a)(B), serves a substantial administrative purpose. Because spending cancellations, which are the vast majority, are limited to total rescission, any potential of cancellation after a fiscal year begins would render agencies legally unable to obligate any funds at the beginning of the year. Otherwise, if a spending item came to be canceled, agencies already would have spent some of the appropriated, but now rescinded, funds, in violation of the Antideficiency Act. In addition, a cancellation necessarily creates a period of uncertainty whether Congress will act legislatively to disapprove it. In that interval, agencies whose funds are affected by cancellations, along with their employees, beneficiaries, and contractors, and, for revenue provisions, affected taxpayers, will be burdened by that uncertainty. To avoid "unnecessarily prolong[ing] the process," while still giving the President time to gather "all supporting material" and make the required determinations, H.R. Conf. Rep. No. 104–491, at 22, Congress prudently limited cancellations to five days after enactment.

Congress also made a number of critical legislative judgments limiting the objects of cancellation. It exempted two-thirds of the budget from the reach of presidential discretion by excluding all current levels of entitlement spending from cancellation. 2 U.S.C. §§691(a)(2), 691e(5), (8) (Supp. II 1996). Only increases in entitlements, such as the New York State Medicaid provision, are subject to the Act. Congress also limited cancellations to dollar amounts of appropriations or limited tax benefits, not broad revenue items or substantive provisions. *See* 2 U.S.C. §691e(4)(A) (Supp. II 1996). By barring cancellation of substantive provisions or "fencing language," Congress ensured "that the President cannot use this authority to modify or alter any aspect of the underlying law." H.R. Conf. Rep. No. 104–491, at 20.

Moreover, the determinations and assessments that the President must make as part of his cancellation decisions provide a robust context for reviewing his exercise of discretion. As required by the Act, 2 U.S.C. §691(a), the President determined and reported to Congress that each cancellation would reduce the federal budget deficit, would not impair any essential government functions, and would not harm the national interest, and for each cancellation the President also provided the required supporting explanations. For instance, the President explained that the New York State Medicaid provision "would have given preferential treatment to only one State" and "established a costly precedent," 62 Fed. Reg. 43263 (1997), thus implementing the requirement that he consider the "States and congressional districts . . . affected" and the "estimated fiscal, economic, and budgetary effect of the cancellation," 2 U.S.C. §691a(b) (Supp. II 1996). In canceling the tax benefit for sellers of agricultural stock, the President described the effect of this cancellation on "the objects, purposes and programs" of the provision, *id.*, when he explained that it "would not have benefitted farmers generally" and "would have created opportunities for the complete avoidance of tax," 62 Fed. Reg. 43267 (1997). If Congress was dissatisfied with these

explanations, it could have acted to disapprove the cancellations, as it did for almost one-half of the items canceled this year. *See supra* p. 17.[21]

Notwithstanding the substantial legislative judgments and standards embodied in the Act, appellees sought below to identify attributes of the Act differentiating it from prior delegations. They noted that the use of cancellation authority is irreversible; that the President must exercise the cancellation authority soon after signing an underlying bill, without any intervening changes in circumstance; and that cancellation is not mandatory, allowing the President to elect to use it to further his own policy goals. The Court's substantial delegation jurisprudence identifies none of these features as injurious to the constitutional legitimacy of a delegation; nor is the Line Item Veto Act the first delegation with these attributes.

The district court was particularly influenced by the assertion that the irreversible nature of a cancellation was "unprecedented," J.S. App. 30a, despite a variety of prior delegations, dating from the early 1800s, authorizing similarly irreversible Executive action. These delegations, including the 1810 law reviewed in *The Brig Aurora,* 11 U.S. (7 Cranch) at 388–89 (*see supra* p. 23), and the 1815 and 1830 statutes relied upon by Justice Harlan in *Field v. Clark,* 143 U.S. at 685–87 (*see supra* pp. 6–7, 23), allowed the President not merely to suspend or adjust, but permanently to *repeal* or *revive,* statutory provisions. The

[21] Of course, even without the disapproval process, Congress retains ultimate control over all appropriation and tax decisions. Because the Act applies only to laws enacted after January 1, 1997, and sunsets on December 31, 2004, 2 U.S.C. § 691 note (Supp. II 1996), with each spending or tax measure enacted over these eight years, Congress makes a fresh decision whether or not to make that measure subject to the Act. *Cf. Raines v. Byrd,* 117 S. Ct. 2312, 2320 (1997) (noting for purposes of standing that Congress can vote "to exempt a given appropriations bill (or a given provision in an appropriations bill) from the Act; again, the Act has no effect on this process"). Each time Congress makes the legislative judgment to let the Act apply, it has chosen to make the individual spending and tax benefit items in that law permissive.

1960s spending ceilings (*see supra* p. 11) and the Gramm-Rudman sequestration authority upheld by the three-judge district court in *Synar,* 626 F. Supp. at 1377, 1382–91 (*see supra* p. 24), also delegated similarly irreversible or permanent authority.

Furthermore, *all* exercises of spending authority are by definition irreversible, once the funds are spent. Through the Act's lockbox mechanism, Congress in effect has mandated that all canceled spending or tax items be transferred to deficit reduction. Once "spent" on deficit reduction, cancellations are irreversible, just as any Executive action applying an appropriation to a particular purpose is, once effectuated, irreversible. That the President cannot reverse cancellations in fact operates as a *constraint* on the delegation, not an expansion.

The contention that a proper delegation requires a lapse of time before exercise, in which circumstances change, also lacks historical support. In fact, one of the most important delegations of recent times, the authority given President Nixon in 1970 to impose wage-price controls, depended on neither an interval of time nor changed conditions after Congress's grant of authority. A three-judge district court upheld Congress's delegation of discretion to impose wage-price controls, despite the fact that the delegated authority became effective immediately upon enactment, was based on already-prevailing economic conditions, was to expire in six months, and was extended for periods of as short as two months, to ensure that Congress could keep "close control." *Amalgamated Meat Cutters v. Connally,* 337 F. Supp. 737, 754 & n.30 (D.D.C. 1971), *cited with approval in Eastlake v. Forest City Enters.,* 426 U.S. 668, 675 (1976).

Similarly, that the President has discretion whether to exercise cancellation authority, and that he may use the authority to further his policy goals, neither suggest any constitutional defect nor distinguish the Line Item Veto Act from such prior delegations as the sweeping authority upheld in *Amalgamated Meat Cutters* "'to issue such orders and regulations as [the President] may deem appro-

priate to stabilize prices, rents, wages and salaries.'" *Id.* at 745 (quoting Economic Stabilization Act of 1970, Pub. L. No. 91–379, tit. II, § 202, 84 Stat. 799, 799–800). As the Court has recently reaffirmed, "'Congress is not confined to that method of executing its policy which involves the least possible delegation,'" *Mistretta,* 488 U.S. at 379 (quoting *Yakus,* 321 U.S. at 425–26), and it is no indictment of a law like the Line Item Veto Act that Congress has delegated "authority that it could exercise itself," *Loving,* 116 S. Ct. at 1744 (citing *Wayman v. Southard,* 23 U.S. (10 Wheat.) 1, 42 (1825)). Because the Line Item Veto Act properly safeguards the separation of powers, the Court should uphold the Act's delegation of Executive authority.

CONCLUSION

The Court should reverse the judgment of the district court.

Respectfully submitted,

THOMAS B. GRIFFITH,
(Counsel of Record)
Senate Legal Counsel,
MORGAN J. FRANKEL,
Deputy Senate Legal Counsel,
STEVEN F. HUEFNER,
A. CHRISTOPHER BRYANT,
Assistant Senate Legal Counsel.
Counsel for the United States Senate.

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Appellants,

v.

CITY OF NEW YORK, *et al.*,

Appellees.

ROBERT E. RUBIN,

Appellant,

v.

SNAKE RIVER POTATO GROWERS, INC., *et al.*,

Appellees.

On Appeal From The United States District Court For The District Of Columbia

BRIEF FOR CONGRESSMEN DAN BURTON, GERALD SOLOMON, AND PORTER GOSS AS AMICUS CURIAE IN SUPPORT OF APPELLANTS

JAMES M. SPEARS
Counsel of Record
THOMAS B. PAHL
GADSBY & HANNAH, LLP
1747 Pennsylvania Avenue, N.W.
Washington, D.C. 20006
(202) 429-9600

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QUESTION PRESENTED

Whether the Line Item Veto Act, Pub. L. No. 104-130, 110 Stat. 1200 (1996), violates the United States Constitution.

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INTEREST OF HOUSE AMICI

Congressman Dan Burton represents the Sixth Congressional District of Indiana, Congressman Gerald Solomon represents the Twenty-Second Congressional District of New York, and Congressman Porter J. Goss represents the Fourteenth Congressional District of Florida (collectively the "House Amici"), in the United States House of Representatives. The House Amici voted on the Line Item Veto Act, Pub. L. No. 104-130, 110 Stat. 1200, codified at 2 U.S.C. §§ 691 *et seq.* ("the Act"), the Balanced Budget Act of 1997, and the Taxpayer Relief Act of 1997. The House Amici believe that the Line Item Veto Act is both constitutional and an innovative budgetary mechanism for eliminating unnecessary federal spending. The House Amici have an interest in having this Court declare that this budgetary mechanism is constitutional so that it can be used to combat unnecessary federal spending.[1]

STATEMENT

Appellees in this action have challenged the constitutionality of the Line Item Veto Act, Pub. L. No. 104-130, 110 Stat. 1200, codified at 2 U.S.C. §§ 691 *et seq.* ("the Act"). In *City of New York, et al. v. William J. Clinton, et al.*, Civ. No. 97-2393 (TFH), appellees attacked the President's

[1] No part of this brief was drafted by any of the parties to this action, and no one other than the amici or their counsel have made a monetary contribution to the preparation or submission of this brief.

use of his authority under the Line Item Veto Act to cancel Section 4722(c) of the Balanced Budget Act of 1997, Pub. L. 105-33, which qualified certain state expenditures for federal financial participation under the Medicaid program. In *Snake River Potato Growers, Inc. et al. v. Rubin*, Civ. No. 97-2463 (TFH), appellees challenged the President's use of his Line Item Veto Act authority to cancel Section 968 of the Taxpayer Relief Act of 1997, Pub. L. No. 105-34, which would have permitted the owners of certain agricultural refining and processing companies to defer the recognition of capital gains on the sale of their facilities to eligible farm cooperatives. The federal district court granted appellees' motion for summary judgment, declaring that the Line Item Veto Act is unconstitutional on the grounds that it violated the Bicameralism and Presentment Clauses of the United States Constitution and that it "impermissibly disrupts the balance of powers among the three branches of government." *City of New York v. Clinton*, 1998 WL 63070, at 13 (D.D.C. Feb. 12, 1998). Appeal was taken directly from the federal district court to this Court.

1. As part of its comprehensive effort to reduce the federal deficit and control runaway federal spending, the 104th Congress sought to strengthen the ability of the President to control the expenditure of appropriated funds. Under the Impoundment Control Act of 1974 ("ICA"), 2 U.S.C. § 681 *et seq.*, the President could only propose rescissions to Congress under a mechanism which anticipated that Congress would expeditiously consider the proposed rescissions. 2 U.S.C. § 683. The ICA proved to be ineffective, as best reflected in that the

President had proposed and Congress had failed to seriously consider $70 billion in proposed rescissions during one five year period in the 1980's.[2] House and Senate leaders, therefore, discussed substantial revisions to the ICA in an effort to make it more effective in restraining spending. Specifically, Congress concluded that legislation to make the ICA effective would have to provide the President with the ability to defer or avoid spending. The Line Item Veto Act is the product of these efforts to respond to the ineffectiveness of the ICA.

In its simplest terms, the Line Item Veto Act authorizes the President to "cancel" specific spending and revenue items contained in any bill or joint resolution signed into law. 2 U.S.C. § 691(a). Under the Act, the President's authority to cancel extends to: (1) "dollar amounts of discretionary budget authority;" (2) "items of new direct spending;" and (3) "limited tax benefits." 2 U.S.C. § 691c. If the President acts to cancel a dollar amount of discretionary budget authority, the cancellation is deemed "to rescind" that authority. 2 U.S.C. § 691e(4)(A). If the cancellation is directed either at an item of new direct spending or a limited tax benefit, it renders the canceled spending or revenue provision "without legal force or effect." 2 U.S.C. § 691e(4)(B) and (C). The Act's "lockbox" provisions prohibit savings resulting from cancellations

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[2] Line Item Veto: Joint Hearing Before the Comm. on Government Reform and Oversight House of Representatives and the Comm. On Governmental Affairs United States Senate, 104th Cong. 12 (1995) (statement of Hon. John McCain, United States Senator from the State of Arizona); *Id.* at 14 (statement of Hon. Dan Coats, United States Senator from the State of Indiana).

being used for any purpose other than deficit reduction, thereby preventing the President from spending or Congress from reappropriating canceled funds. 2 U.S.C. § 691b(b).

To cancel an item of spending, the President must submit a special message to Congress within five calendar days following the enactment of the law containing the provision to be canceled. 2 U.S.C. §§ 691(a)(B), 691a(c)(1). In making such cancellations, the President must affirmatively find that the cancellation will reduce the Federal budget deficit and will not impair any essential government function or harm any national interest. 2 U.S.C. § 691(a)(A). In his special message to Congress, the President must also set forth his reasons for canceling the item, the estimated fiscal and budgetary impact of the cancellation, as well as the cancellation's likely geographic impact. 2 U.S.C. § 691a(b).

Cancellation occurs when Congress receives the President's special message. 2 U.S.C. § 691b(a). Canceled provisions become the subject of highly expedited disapproval bills. 2 U.S.C. §§ 691d, 691e(6). If a disapproval bill is then enacted into law, it nullifies the cancellations contained in the bill and the canceled spending or revenue provisions become effective again. 2 U.S.C. § 691b(a). The President may not use his cancellation authority under the Line Item Veto Act with respect to disapproval bills. 2 U.S.C. § 691(c).

2. In the decision below, the court held that the Line Item Veto Act is unconstitutional under the presentment and bicameralism requirements of Article I and that it also "impermissibly disrupts the balance of powers

among the three branches of government." *City of New York*, 1998 WL 63070 at 13. As to the presentment and bicameralism requirements of Article I, the court concluded that the Line Item Veto Act allows the President to "produc[e] laws that had not adhered to those requirements." *Id.* at 11. According to the court below, "[t]here is no way of knowing whether these laws, in their truncated form, would have received the requisite support from both the House and Senate," *id.*, and, "because the laws that emerged after the Line Item Veto are not the same laws that proceeded through the legislative process, [they] are not valid." *Id.*

Central to the court's analysis is its view that the President's power to "cancel" an appropriation under the Act can constitute nothing short of a veto. *Id.* at 12. In reaching this conclusion, the court relied heavily upon the Act's definition of "cancel," which either "rescinds" discretionary budget authority or deprives other appropriations of "legal force and effect." *Id.* The court also deemed significant the fact that a Presidential cancellation under the Act can only be overcome with the passage of new legislation. *Id.* In the court's view, the President's authority to cancel "has every mark of a veto" and refused to entertain any alternative characterizations. *Id.*

Beyond the technical requirements of bicameralism and presentment, the court went on to condemn the Act on general separation of powers principles. According to the court,

> [t]he Line Item Veto Act impermissibly crosses the line between acceptable delegations of rulemaking authority and unauthorized surrender to the President of an inherently legislative function, namely, the authority to permanently shape laws and package legislation.

Id. at 14. The court below distinguished the power conferred on the President under the Line Item Veto Act from powers normally deemed acceptable delegations of rulemaking authority. The court noted that the Line Item Veto Act is distinguishable because cancellation is permanent, and, therefore, canceled provisions cannot be revived by either the President or his successors. *Id.* Thus, from the court's perspective below, the Line Item Veto Act "enables the President, in his discretion, to pick and choose among portions of an enacted law to determine which ones will remain valid." *Id.* In the court's view, such authority cannot be reconciled with "the central tenets of our system of government. . . . " *Id.* at 15.[3]

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[3] The district court suggested, without further analysis, that the provisions of the Act relating to limited tax benefits confers upon the President an "unprecedented" power to "make permanent changes" to the Internal Revenue Code. *Id.* While nothing in the district court's decision warrants treating the limited tax benefit provision differently from the other provisions of the Act, the House Amici would respectfully submit that in the event this Court determines that the limited tax benefit provision of the Act stands on different constitutional grounds, that this part of the Act is severable and should be severed. Under well-established precedent, unless Congress would not have enacted the remainder of the Line Item Veto Act independent of the tax expenditure provision, the tax expenditure provision is to be severed if the remainder of the Act is fully operative as a law. *Alaska Airlines, Inc. v. Brock*, 480 U.S. 678, 685 (1987). House Amici believe that the tax expenditure provision is severable because the Line Item Veto Act would have been enacted even without that provision and because the Act's operation without that provision will nevertheless accomplish Congress's intent of controlling excessive federal spending.

SUMMARY OF ARGUMENT

The House Amici respectfully submit that the decision below declaring the Line Item Veto Act unconstitutional is incorrect. In concluding that the President's cancellation authority under the Act is unconstitutional, the court below engaged in an impermissibly simplistic construction of the Act, drawing its interpretation exclusively from isolated clauses and definitions in the Act while ignoring the substance and purpose of the Act as well the substantial history of Presidents exercising similar authority in the past. The decision below has the effect of constitutionalizing an area of federal authority in which the legislative and executive branches have previously exercised concurrent powers and where the scope of executive authority has historically fluctuated in response to internal political considerations and external forces. In this manner, the decision below freezes into the constitutional firmament the allocation of these concurrent powers found in the Impoundment Control Act of 1974, which was enacted at a time when the relations between the executive and legislative branches were particularly strained. For these reasons and for the reasons expressed in the Solicitor General's brief of March 13, 1998, the House Amici respectfully submit that the decision below should be reversed and the Line Item Veto Act declared constitutional.

ARGUMENT

1. In reaching the conclusion that cancellation under the Act is tantamount to a Presidential veto, the

court below overlooks the obvious and more contextually defensible alternative that a cancellation under the Act is, in fact, what Congress intended it to be – a limited and carefully defined power of rescission. In substantial part, in passing the Line Item Veto Act, Congress sought to loosen the very tight restrictions that the Impoundment Control Act of 1974 had placed upon the President's powers of recission and reserve. Indeed, the stated purpose of the Act was to expand the President's "rescission authority to include both new direct spending and limited tax benefits." H.R. Conf. Rep. No. 104-491, at 16 (1996). Because the Line Item Veto Act represented an effort on the part of Congress to readjust the standards governing the rescission and reserve authority that it conferred upon the President, the constitutionality of the Act should be adjudged against other forms of rescission and reserve that historically have been employed by the legislative and executive branches to integrate their powers into a workable government.

History provides numerous and various examples of rescission and reserve. For example, in responding to the extraordinary budgetary and financial pressures created by the Great Depression in 1933, Congress granted President Roosevelt broad powers to reorganize the executive branch and provided that all appropriations "unexpended by reason of" such reorganization be "impounded and returned to the Treasury." Act of March 3, 1933, ch. 212, § 16, 47 Stat. 1517-1519. In more recent times, facing the sharply escalating costs of the Vietnam War, Congress passed the Revenue Expenditure Control Act of 1968 (Pub. L. No. 90-364, §§ 202(a), 202(b)) which sharply curtailed budget outlays for 1969 and gave the

President unrestricted discretion to reserve as much as $6 billion in outlays and $10 billion in new spending to achieve budgetary objectives.[4]

Neither of these Acts involved the unconstitutional delegation of legislative authority. Instead, each represented the creation of executive power. When President Roosevelt reorganized his executive branch agencies and returned the savings to the Treasury, he was neither "producing new law" nor ignoring the bicameral passage and presentment requirements of Article I. Instead, he was "faithfully executing" the power that Congress had conferred upon him by duly enacted legislation. When President Johnson reserved the many billions in outlays and new appropriations for 1969, he was not "single-handedly revising the work" of the legislative branch. He, too, was faithfully executing the law that Congress had duly enacted.

These examples reflect the obvious proposition that while Article I confers upon Congress the ultimate responsibility to appropriate funds and control expenditures through its lawmaking powers, it also affords Congress the ability to create and confer upon the executive subordinate authority to aid in the accomplishment of legislative objectives. The scope and extent of such executive authority fluctuates over time in response to changed circumstances, such as war and economic depression, and reflects the extent to which the legislative branch has

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[4] The Amicus Brief submitted by the United States Senate in the proceeding below contains an excellent description of the many forms of rescission and reserve that have been used throughout American history.

confidence that the executive shares its goals and will aid in the accomplishment of its objectives. So long as Congress has not divested itself of the ultimate power, through legislation, to either override particular executive determinations or to rescind the executive authority *in toto*, it has fully retained its exclusive lawmaking authority under the Constitution. In this respect, the President's rescission and reserve authority operates in a manner indistinguishable from the rulemaking authority that Congress routinely assigns the executive in regulatory legislation.

2. Compared to these historical examples of rescission and reserve, the authority accorded the President under the Line Item Veto Act is unexceptional. While the court below concluded that the President's cancellation authority under the Act is a veto because a canceled item cannot be restored short of the enactment of new law, it is obvious that the same fate awaited any executive branch office or function that was "reorganized" by President Roosevelt and whose funding was "impounded and returned to the Treasury." Once funds are "impounded and returned to the Treasury," the President presumably does not possess the unilateral authority to recreate the preexisting agency and restore its funding, and new legislation would be required to recreate the office or function in question and appropriate funds for its operation.

Indeed, in many significant respects, the Line Item Veto Act more closely circumscribes the rescission and reserve authority accorded the President than did these earlier examples. Unlike the Act of March 3, 1933, the Line Item Veto Act does not grant the President the broad authority to reorganize executive agencies, bureaus and

offices. Nor does it give the President the broad authority to consolidate budgets or adjust funding levels. Instead, the Line Item Veto Act forces the President to either accept or reject, without adjustment or revision, the funding and appropriation levels set by the Congress. Unlike the Revenue Expenditure Control Act of 1968, which gave the President broad authority over the course of a funding cycle to reserve funds, the Line Item Veto Act requires the President to make and notify Congress of any rescission he wishes to make within five days of his signing of the appropriating or authorizing legislation. 2 U.S.C. §§ 691(a)(B), 691a(c)(1). Finally, unlike either example discussed above, the Line Item Veto Act highlights the subordinate and derivative nature of the President's rescission authority by requiring that the President explain the reasons for his rescission and by making explicit provision for Congress's expeditious consideration of disapproval legislation. 2 U.S.C. §§ 691a(b), 691d, 691e(6).

The derivative and subordinate nature of the President's cancellation authority power under the Line Item Veto Act further ensures that it is not the unconstitutional delegation of legislative authority that the court below found. Conspicuously absent from the decision below is any discussion or recognition of the fact that Congress retains the full and complete authority to exempt any specific piece of legislation from the application of the Line Item Veto Act. Because Congress retains this power, it has effectively made a conscious determination that each piece of legislation subject to the Line Item Veto Act will be subject to the President's rescission authority.

Similarly, the decision below fails to acknowledge or consider that the Line Item Veto Act imposes no limitation on Congress's authority or ability to limit, modify or expand the President's rescission authority in subsequent legislation. Just as the Impoundment Control Act of 1974 and the Line Item Veto Act itself have reflected the changing views of Congress regarding the utility and advisability of granting rescission authority to the President, Congress retains the full and complete authority to revisit its current formulation of the President's rescission authority in the future.[5]

3. The fundamental error committed by the court below is that none of this rich reservoir of historical or contextual evidence appears in the decision below. Instead, the court simply concludes that because the term "cancel" in the Act is defined as meaning "to rescind" or to deprive the affected provision of "legal force and effect," the President's authority to cancel can *only* be accurately characterized as a "veto." *City of New York*, 1998 WL 63070 at 12.[6] The balance of the court's holding –

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[5] Indeed, the fact that the Act expires under its own terms in 2005 means that the Congress will have to affirmatively reconsider and re-adopt the President's cancellation authority within the next seven years. Congress, thus, jealously guarded its legislative prerogatives through the inclusion of this sunset provision in the Act.

[6] The court below apparently deems significant the fact that when the President invokes his cancellation authority, the subject provision is deprived of "legal force and effect." *City of New York*, 1998 WL 63070 at 12. However, it would seem obvious that once the President elects to utilize his cancellation authority with respect to a given provision, Congress would want to make sure that such provision had no lingering

that the President's cancellation authority confers the power to "produc[e] law" or that the Act "surrender[s] to the President an inherently legislative function," *id.* at 11 and 14 – flows from this simplistic and abstract linguistic analysis.

As this Court has repeatedly observed, however, the meaning of the Constitution and the constitutionality of laws cannot be divined by simply parsing words and phrases. As Justice Frankfurter noted nearly fifty years ago, "[d]eeply embedded traditional ways of conducting government cannot supplant the Constitution or legislation, . . . they give meaning to the words of a text or supply them." *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 610 (1952). Here, Congress employed this language in the Line Item Veto Act to achieve a specific objective: to confer again on the President an authority that had lain dormant for nearly a quarter of a century. It is against this backdrop that the constitutionality of the Line Item Veto Act must be assessed. Considered together, the historical record, the expressed purpose and objective of Congress as well as the contextual evidence demonstrate that the Line Item Veto Act creates neither an impermissible veto nor an unconstitutional delegation of legislative powers. Instead, the Act simply creates a form of executive authority, not unlike the authority routinely created by regulatory legislation, which, because it remains subject to Congress's plenary supervision and control, is constitutionally unobjectionable.

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collateral effects as a matter of law. Hence, the need to be clear as to the legal effect of a Presidential cancellation.

Indeed, much of what the court below deems constitutionally objectionable are factors which are routinely accepted as constitutional in the context of regulatory legislation. For example, the court deems constitutionally significant the fact that by virtue of the President's exercising his cancellation authority under the Line Item Veto Act, the law which is ultimately implemented may vary from the precise terms which were adopted by Congress. The court expressed its concern by observing that:

> Both Houses of Congress, through a process of discussion and compromise, had agreed upon the exact content of the Balanced Budget Act and the Taxpayer Relief Act. These laws reflected the best judgment of both Houses. The laws that resulted after the President's line item veto were different from those consented to by both Houses of Congress. There is no way of knowing whether these laws, in their truncated form, would have received the requisite support from both the House and Senate.

City of New York, 1998 WL 63070 at 11.

The court's logic here is flawed in that it fails to recognize that in "agree[ing] upon the exact content of the Balanced Budget Act and the Taxpayer Relief Act," Congress was fully aware of and knowingly accepted the possibility that the cancellation authority that it so recently had conferred on the President might ultimately affect the appropriation and spending decisions that it had made in the legislation.

Congress legislates against a complex regulatory and legal backdrop and routinely recognizes that particular projects or programs it favors may be frustrated by the

executive branch exercising its duly constituted authority under other legal regimes. For example, virtually every public works project approved and authorized by Congress is subject to review under National Environmental Policy Act ("NEPA"), 42 U.S.C. § 4331 *et seq.*, which confers broad responsibility and authority on executive branch officials to assess and consider the likely environmental impacts of such projects and to take such impacts into consideration in determining whether to go forward with any particular project. In authorizing or funding a particular public works project, Congress fully understands and appreciates the fact that executive review may significantly affect or ultimately frustrate its legislative objective. As is true with the Line Item Veto Act, where Congress decides that it does not wish to have its decisions reconsidered or reevaluated by the executive branch, it need only exempt the legislation in question from NEPA's review requirements to accomplish that objective.

Thus, it begs the question to ask whether the Balanced Budget Act and the Taxpayer Relief Act appropriation bills, as ultimately affected by the President's cancellations under the Line Item Veto Act, would have "received the requisite support from both the House and Senate." *City of New York*, 1998 WL 63070 at 11. It is respectfully submitted that the more appropriate question to ask is whether these laws would have been approved in the form in which they were adopted had the Line Item Veto Act not been in place. Contrary to assumption implicit in the district court's analysis, there is no evidence that either of the provisions at issue in this case would have been approved by Congress in the

absence of the Line Item Veto Act. Indeed, the fact that Congress anticipated that the President would exercise his authority under the Line Item Veto Act is reflected in the fact that Congress expressly identified the provision at issue in the Snake River Potato Growers case as a "limited tax benefit." Taxpayer Relief Act of 1997, Pub. L. No. 105-34, 111 Stat. 788 (1997). Given that the term "limited tax benefit" has no discernable meaning apart from the Line Item Veto Act, it is not unreasonable to assume that by using this language, Congress was, in fact, inviting the President's review under the Line Item Veto Act. Accordingly, the central question that the court below ignored was whether the benefit to the Snake River Potato Growers would have been adopted at all in the absence of the Line Item Veto Act.

The courts must assume that Congress understood and anticipated the likely impact of the Line Item Veto Act and the exercise of the Presidential authority contained therein when it passed the Balanced Budget Act and the Taxpayer Relief Act. Congress does not legislate in a legal vacuum and thus its intent and purpose cannot be accurately assessed or understood in some abstract sense. Instead of wondering whether the Congress would have passed the legislation in question in light of how the President ultimately exercised his cancellation authority, the courts should assume that neither the Balanced Budget Act nor the Taxpayer Relief Act would have been passed in the form in which it was adopted had that authority not existed.

Thus, to the extent that the President's cancellation authority under the Line Item Veto Act otherwise constitutes a permissible form of legislatively created executive

authority, the lower court's concerns regarding the ability of Congress to control and direct legislation are misplaced. Congress understands that it legislates against a complex legal and regulatory backdrop. Where necessary, Congress is fully and completely able to protect its legislative prerogatives, without the district court's assistance, by simply exempting legislation from the reach of the Line Item Veto Act.

4. Fundamentally, the decision below fails to recognize that while Congress retains the ultimate lawmaking power under the Constitution, it also has broad power to create executive authority to assist it in that process. The process by which federal funds are appropriated and spent necessarily involves the exercise of the legislative power to appropriate and the executive power to spend. While the Constitution's exclusive grant of lawmaking power to the legislative branch vests final and ultimate authority with the legislature, it does not prevent the legislature from working with the executive to develop mechanisms, like rescission and reserve, in order to integrate and complement the powers vested in the two branches of government in an area in which both exercise some level of authority. So long as the Congress retains its inherent legislative power by reserving unto itself the ability to revisit and, if necessary, revise the President's cancellation authority under the Act, the integration of legislative and executive powers contemplated by the Line Item Veto Act is precisely the sort of cooperative approach to governance that the Constitution anticipates.

These constitutional truths were perhaps best expressed by Justice Jackson nearly fifty years ago when he wrote in *Youngstown Sheet & Tube, Co.*:

> The actual art of governing under our Constitution does not and cannot conform to judicial definitions of the power of any of its branches based on isolated clauses or even single Articles torn from context. While the constitution diffuses power the better to secure liberty, it also contemplates that practice will integrate the dispersed powers into a workable government. It enjoins upon its branches separateness but interdependence, autonomy but reciprocity. Presidential powers are not fixed but fluctuate, depending upon their disjunction or conjunction with those of Congress.

343 U.S. at 870. The Line Item Veto Act represents the efforts of the legislative and executive branches to "integrate" their dispersed powers into a more effective and responsible approach to the process by which federal funds are appropriated and spent.

The approach to rescission and reserve contained in the Line Item Veto Act reflects a view, shared by both the executive and legislative branches, that the sharply circumscribed formulation of rescission authority contained in the Impoundment Control Act of 1974 was not adequate to address the problem of excessive federal spending. The decision below, however, has the effect of constitutionalizing the very narrow view of permissible rescission authority which is found in the Impoundment Control Act by assuming that any act by the executive which has the effect of reducing spending below that level anticipated in an appropriations bill constitutes an

unconstitutional usurpation of the legislative function. Not only would this remove from the executive and legislative branches the ability to experiment with alternative approaches to rescission and reserve, it also fixes into the constitutional firmament a formulation which was adopted at a time when relations between the executive and legislative branches were strained and antagonistic. The decision below casts a long constitutional shadow across a form of legislatively-created executive authority which has served this country well in times of war and severe economic disruption and leaves both the legislative and executive with little guidance as to how such authority might be constitutionally crafted in the future.

Future Congresses and Presidents will doubtlessly face new and different challenges which will render the rescission formulation contained in this Act as outdated and inoperable as provisions of the Impoundment Control Act of 1974 appear today. As much as this case is about the constitutionality of the specific formulation contained in this Act, it is also about whether the Court will permit the legislative and executive branches to make these choices in the future. It is respectfully submitted that the Line Item Veto Act represents the sort of cooperative integration of legislative and executive authority that the Constitution anticipates and that responsible government demands.

CONCLUSION

For the reasons set forth herein, House Amici respectfully request that this Court reverse the lower court's grant of summary judgment and declare that the Line Item Veto Act is constitutional.

Respectfully submitted,

March 13, 1998

JAMES M. SPEARS
THOMAS B. PAHL
GADSBY & HANNAH, LLP
1747 Pennsylvania Avenue, N.W.
Washington, D.C. 20006
(202) 429-9600

Counsel for Amici Congressmen Dan Burton, Gerald Solomon, and Porter Goss

(9)

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1997

WILLIAM J. CLINTON, et al.,

Appellants,

v.

CITY OF NEW YORK, et al.,

Appellees.

ROBERT E. RUBIN,

Appellant,

v.

SNAKE RIVER POTATO GROWERS, INC., et al.,

Appellees.

On Appeal From The United States District Court For The District of Columbia

BRIEF FOR REPRESENTATIVES HENRY A. WAXMAN, DAVID E. SKAGGS, AND LOUISE M. SLAUGHTER AS *AMICI CURIAE* IN SUPPORT OF APPELLEES

ALAN B. MORRISON
(Counsel of Record)
COLETTE G. MATZZIE
PUBLIC CITIZEN LITIGATION GROUP
1600 20TH STREET, NW
WASHINGTON, DC 20009
(202) 588-1000

April 3, 1998

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INTEREST OF HOUSE AMICI

Amici are members of the House of Representatives. Representative Henry A. Waxman represents the Twenty-ninth Congressional District of California, Representative David E. Skaggs represents the Second Congressional District of Colorado, and Representative Louise M. Slaughter represents the Twenty-eighth Congressional District of New York. They all voted against the Line Item Veto Act of 1996, Pub. L. No. 104-130, 110 Stat. 1200, codified at 2 U.S.C. §§ 691 *et seq*, (the "Act"). In addition to their argument that the Line Item Veto Act is unconstitutional, *Amici* submit this brief to present to the Court the separate argument that the Act is inseverable because inclusion of all three types of spending was essential to passage of the Act.[1]

INTRODUCTION AND SUMMARY OF ARGUMENT

Amici submit this brief principally to demonstrate that tax benefit and direct spending provisions are not severable from the remainder of the Line Item Veto Act of 1996. As we argue in Part I, Congress's decision to subject all three types of spending -- discretionary spending, new items of direct spending, and limited tax benefits -- to the President's "cancellation" power was critical to the delicate compromise that was required to secure enactment of the Act. Therefore, even though the Line Item Veto Act could still be "fully operative as a law" even if the President's power to cancel

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[1] Pursuant to S. Ct. Rule 37.6, no part of this brief was drafted by any of the parties in this action, and no one other than *Amici* or their counsel have paid for preparation or submission of this brief.

new items of direct spending and limited tax benefits were taken away, leaving only the power to cancel discretionary spending items, the entire Act should be stricken.

In Part II, *Amici* present a brief argument on the merits. Specifically, *Amici* argue that five aspects of the cancellation power demonstrate the legislative character of the powers granted to the President under the Act. We also show that the statutes identified by the government and its *amici* provide no precedent for the transfer of legislative powers to the President under the Act and that, therefore, the Act is an unconstitutional attempt to expand the President's Article I powers. Before turning to the merits arguments, and in order to understand why the Act is not severable, it is necessary to discuss the legislative history of the Line Item Veto Act in the 104th Congress in some detail.[2]

THE LEGISLATIVE HISTORY OF THE LINE ITEM VETO ACT OF 1996.[3]

The Line Item Veto Act originated in the 104th Congress's Republican majority's "Contract With America."

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[2] *Amici* also fully support the standing of the sets of plaintiffs before this Court. Both lost a valuable benefit through the President's cancellation of items in the Balanced Budget Act and the Taxpayer Relief Act, respectively, and, thus, have sustained injuries that will be redressed by a favorable ruling on the constitutional issue.

[3] A summary of the legislative history of the Act was also submitted in the Joint Appendix in *Raines v. Byrd*, No. 96-1671, at 67-90.

As the history of the Act shows, Congress decided to enact a "strong" version of item veto authority, ceding to the President the power to eliminate spending items permanently, without requiring further Congressional action, and to include the authority to delete not only discretionary spending items, but also new entitlements and certain tax benefits as essential elements of the compromise bill that was ultimately enacted.

On January 3, 1995, H.R. 2, titled "The Line Item Veto Act," was introduced and referred to the Committee on Government Reform and Oversight. *See* H.R. 2, 104th Cong. 1st Sess. (1995). The bill was a broad-ranging "enhanced rescission" line item veto, under which the President had twenty days after a bill was enacted to veto items which he disapproved. It permitted the President to "rescind all or part of any discretionary budget authority." § 2(a). The President's authority was not limited to items in the statute itself, but included identifiable items in the legislative history. The bill provided that any budgetary authority that was rescinded "shall be deemed cancelled unless" Congress overrode it, § 3(a)(1), and that "any provision of law *vetoed* under this Act . . . shall be deemed *repealed* unless . . . a rescission/receipts disapproval bill restoring that provision is enacted into law." § 3(a)(2) (emphasis added). In addition, it also authorized the President to "*veto* any targeted tax benefit" (one limited to a few persons), subject to the same two-thirds override. § 2 (emphasis added).

In the Senate, two principal item veto bills were introduced. S. 4, an "enhanced rescission" bill, was substantially the same as H.R. 2, except that it did not permit item vetoes of tax expenditures. *See* S. 4, 104th Cong., 1st Sess. (1995). Like H.R. 2, it required a two-thirds override,

allowed the President to reduce as well as eliminate items of budgetary authority, and was not limited to items appearing in an appropriations bill itself. *See* S. Rep. No. 9, 104th Cong., 1st Sess. (1995); S. Rep. No. 13, 104th Cong., 1st Sess. (1995). The other vehicle, S. 14, was an "expedited rescission" bill providing for a mandatory and expedited vote on the President's proposed rescissions which included new items of direct spending and tax expenditures. *See* S. 14, 104th Cong., 1st Sess. (1995). Under it, however, the President's proposals would not become effective without Congressional approval. *See* S. Rep. No. 10, 104th Cong., 1st Sess. (1995); S. Rep. No. 14, 104th Cong., 1st Sess. (1995). Both bills were referred jointly to the Committees on Budget and on Governmental Affairs.

On January 12, 1995, the House Government Reform and Oversight Committee held a joint line item veto hearing with the Senate Government Affairs Committee. *See Line-Item Veto: Joint Hearing Before the Comm. on Gov. Reform and Oversight House of Reps. and Comm. on Gov Affairs, Senate*, 104th Cong. 1st Sess. (1995). In his introductory remarks, Rep. Clinger, the Chair of the House Government Reform and Oversight Committee, recommended H.R. 2, in part because it included limited tax benefits: "These types of excesses, both taxing and spending, must be controlled, and H.R. 2 will provide us with a much-needed tool to help in that effort." *Id.* at 2; *see also id.* at 3 (Statement of Rep. Morella, emphasizing that H.R. 2 would allow deletion of "targeted, special-interest taxbreaks"). In his testimony, Robert D. Reischauer, Director of the Congressional Budget Office, warned the Committee that including tax and direct spending provisions would make the law more difficult to administer and vulnerable to legal challenge. *Id.* at 63-70, 74.

Testifying for the Administration, Alice Rivlin, Director of the Office of Management and Budget, expressed support for a "strong version" of the item veto. She praised H.R. 2 because, unlike S. 4, it extended the President's cancellation powers to limited tax benefits. In fact, Director Rivlin urged the Committee to expand the tax benefit provision: "A broader complement of tax items would complement the application of a line-item veto to all items of budget authority." *Id.* at 50.

On January 18, 1995, the Senate Budget Committee held hearings on both S. 4 and S. 14. In his opening statement, Chairman Domenici stated that he preferred S. 14, the "expedited rescission" alternative, because S. 4 involved a "maximum shift in power." *Line-Item Rescission Authority: Hearings on S. 4 and S. 14 Before The Comm. on the Budget*, 104th Cong., 1st Sess. 2 (1995). In the words of its sponsors, S. 14 would have "guarantee[d] the President a vote on his rescission proposals while maintaining the delicate balance of power between the two branches on spending authority." *See* S. Rep. No. 9, at 15 (additional views of Sen. Domenici). In addition, Sen. Domenici noted that S. 14 provided for rescission of direct spending -- an expanding portion of the federal budget -- as well as appropriations. *Hearings on S. 4 and S. 14*, at 2; *see also id* at 3 (Sen. Exon, co-sponsor of S. 14: "while Sen. McCain's bill applies only to appropriations . . . our bill applies to appropriations, new entitlements and new targeted tax benefits").

S. 4's sponsors, Sens. McCain and Coats, defended their bill. But when questioned, they too acknowledged interest in broadening S. 4 to reach tax benefits and direct spending, although they cautioned that they would only want

to see these additions if it would enhance, and not hinder, the likelihood of passage of an item veto bill. *Id.* at 50. In his testimony, Sen. Bradley urged the Committee to address wasteful spending in special interest tax benefits, as much as or even more than in appropriations. *Id.* at 58-68. Just as she had done for H.R. 2, Director of OMB Rivlin testified in support of S. 4. *Id.* at 68-76. Nonetheless, she emphasized that the Administration would prefer a bill that included limited tax benefits and had the broad definition of "targeted tax benefits" under S. 14, rather than the more narrow definition under H.R. 2. *Id.* at 71.

Shortly thereafter, on January 24, 1995, the Subcommittee on the Constitution, Federalism, and Property Rights of the Committee on the Judiciary held a hearing to consider two proposed constitutional amendments, S.J. Res. 2 and S.J. Res. 16. *See The Line-Item Veto: A Constitutional Approach: Hearings before the Subcomm. on the Constitution, Federalism, and Property Rights of the Comm. on the Judiciary*, 104th Cong., 1st Sess (1995). Appearing for the Administration was Assistant Attorney General Walter Dellinger of the Office of Legal Counsel, who stated that the President supported a "strong line-item veto" bill, in particular S. 4. *Id.* at 33. He expressed his opinion that S. 4 is "clearly constitutional" as "a very strong delegation of authority to the President . . . not to expend appropriated funds . . .." *Id.* at 34. He also stated quite clearly what he thought would *not* be constitutional: a literal line item veto. Citing what he called "a long tradition at the Office of Legal Counsel," and invoking the views of three of his predecessors, he stated that all of them "have agreed the President does not at present have that power constitutionally." *Id.* at 36. "Congress cannot literally give the President a line item veto power by

statute, and . . . attempts that appear to literally give the President a line item veto by statute are also constitutionally invalid." *Id*; *see also id.* at 38.

In his prepared statement, Mr. Dellinger explored at greater length the constitutionality of S. 4 and other pending bills. While defending "enhanced rescission" as a lawful delegation to the President of discretion over spending appropriated funds, he expressed doubts about the constitutionality of extending that power to targeted tax benefits, as had been done in H.R. 2, because it purports "to authorize the President to 'veto' targeted tax benefits after they become law, thus resulting in their 'repeal.'" *Id.* at 49. He then observed that "use of the terms 'veto' and 'repeal' is constitutionally problematic [because Article I, § 7 of the Constitution] provides that the President only can exercise his 'veto' power before a provision becomes law." *Id.* He also observed that "the word 'repeal' suggests that the President is being given authorization to change existing law on his own [which] arguably would violate the plain textual provisions of Article I, Section 7 of the Constitution, governing the manner in which federal laws are to be made and altered." *Id.* Mr. Dellinger's method of avoiding these "constitutional shoals" would be to "recast" H.R. 2 so that it "eliminates the word 'veto' from the targeted tax benefit provision, and confers on the President the power to *suspend* (rather than 'repeal') such benefits." *Id.* (emphasis in original). These changes, which were never made, would "preserve the purpose of the provision" and "would place the targeted tax benefit provision on the same defensible constitutional footing as the provision regarding rescission of budget authority." *Id.*

A markup of H.R. 2 was held on January 25, 1995,

and the bill was reported favorably, with amendments, by a roll call vote of 30-11. *See* H.R. Rep. No. 11, 104th Cong., 1st Sess. 12 (1995). There were several committee decisions of note. The period during which the President had the right to veto items was shortened from the original twenty calendar days (not including Saturdays, Sundays, or holidays), to ten calendar days, not including Sundays. *Id.* at 2. The term "targeted tax benefit" was expanded so that the maximum size of the group of taxpayers whose benefits could be vetoed went from five to 100. *Id.* at 2, 26, 27.

The House Report was clear about the purpose of H.R. 2: the bill "strengthens the President's ability to rescind (cancel) appropriated funds. It also allows the President to *eliminate* targeted tax benefits . . .. " *Id.* at 8 (emphasis added); *see also id.* at 10 (budget authority or targeted tax benefits will automatically be "terminated" after fixed number of days unless Congress acts by bill or joint resolution to disapprove President's proposal). Much of the Committee Report focused on the perceived need to reach tax benefits. In an oft-cited example, the Report discussed how, as the Revenue Act of 1992 made its way through Congress, 50 special tax breaks were added that, in the end, completely outspent the cost of the Act's enterprise zones and led to a Presidential veto. *Id.* at 8. "The special tax benefits . . . covered such interests as special exemptions for certain rural mail carriers, special rules for Federal Express pilots, deductions for operators of licensed cotton warehouses, exemption for some small firearm manufacturers, and exemptions for certain ferry operators." *Id.* The Line Item Veto Act was intended, in part, as a direct response to the perceived evil of special interest tax breaks.

House floor consideration of the bill occurred on February 2, 3, and 6, 1995. *See* 141 Cong. Rec. H1078-1142; 1168-91; 1225-64 (daily ed.). A major focus of the debate was the scope of the cancellation powers under H.R. 2 and concerns that the Act might not do enough to control the two main areas of spending growth: tax benefits and direct spending (entitlements). *See, e.g.*, H1094 (Rep. Moran); H1101-02 (colloquy between Reps. Barrett and Blute). At the same time, in urging adoption of the "expedited rescission alternative, opponents of the bill cited Mr. Dellinger's testimony that the power to eliminate tax benefits may be unconstitutional. *See, e.g.*, H1082 (Rep. Beilenson).

Three separate efforts to broaden the authority of the President to eliminate tax benefits of various kinds were defeated. *See* 141 Cong. Rec. H1116, H1125, H1168, H1170, H1235, H1255 (daily ed.). Rep. Slaughter introduced an amendment to broaden the tax benefit provision to any tax benefit that would have the effect of treating differently "a particular taxpayer or limited class of taxpayers" except based on certain demographic conditions. H1116. Arguing against the Slaughter amendment, Rep. Blute defended H.R. 2 as a compromise: "We accepted a bipartisan amendment to change the definition to include 100 or fewer taxpayers to get at rifle shots or special deals." H. 1120. Although the debate on the extent of the power to cancel tax benefits was lively, no one questioned the integral nature of the tax benefit provision to passage of the entire legislation.

The single most crucial vote was on an "expedited rescission" substitute offered by Reps. Wise, Stenholm, and Spratt. Expedited rescission, like the mechanism in S. 14, would have established procedures for voting on a President's

proposed rescission under the Impoundment Control Act of 1974, 2 U.S.C. § 688. Even though 342 Members of the House had voted for this approach in 1994, H1171-72, H1245, and even though there was no question as to the constitutionality of expedited rescission, H1185, the House twice voted it down. H1242-56. At the end of the lengthy debate, a vote to recommit to Committee with instructions to broaden the tax benefit provision was defeated, largely along party lines, by a vote of 185-241. H1263.

Back in the Senate, on February 22, 1995, the Senate Budget Committee reported out S. 4 with amendments, but without recommendation. *See* S. Rep. No. 9, at 13. The Budget Committee also reported out S. 14 with some small changes to the bill, but keeping the essential feature that rescissions would not take effect until Congress had affirmatively approved them. *See* S. Rep. No. 10, at 9. In addition, S. 14 would apply to "targeted tax benefits" which, like the House's version, were limited to 100 or fewer persons. *Id.*

The next day, the Senate Committee on Government Affairs held an additional hearing on S. 4 and S. 14. Sen. Glenn and others expressed interest in extending any item veto bill to tax benefits and in adopting a broader definition of tax benefit than only provisions affecting 100 or fewer taxpayers. *See S. 4 and S. 14, Line Item Veto, Hearing Before the Comm. on Gov. Affairs*, 104th Cong., 1st Sess. 5 (1995). Sen. McCain, testifying in favor of S. 4, conceded that there were valid policy reasons for including tax benefits. *Id.* at 20. The Committee also heard testimony that S. 4 was unconstitutional and ill advised, in part because it would permit cancellation of existing entitlements. *Id.* at 32

(Testimony of A. Schick, Professor, George Mason Univ.). Nonetheless, shortly thereafter, the Government Affairs Committee reported S. 4 as passed by the Budget Committee, and S. 14, without recommendation and with no further amendments. S. Rep. No. 13, at 6; S. Rep. No. 14, at 6, 11.

S. 4 then went to the Senate floor where it was considered on March 16, 17, 20, 21, 22 and 23. *See* 141 Cong. Rec. S4074-89, S4125-45, S4153-96, S4212-60, S4295-4358, S4409-87 (daily ed.). Almost immediately, the Senate leadership announced that the "enhanced rescission" version of the line item veto would not, in fact, be the approach that the leadership supported. *See* S4075. Instead, debate would be on a "separate enrollment" proposal, on which bills had been introduced, but which had not been the subject of mark-up or hearings in any of the relevant committees. S4075-76. Although the mechanisms for the two alternatives differed, the goals and results were the same: to give the President the power to accept some spending and tax items, while rejecting others.

Majority Leader Senator Dole introduced the separate enrollment substitute. *See* S4188-89. Under separate enrollment, once an appropriations bill passed both Houses in agreed-upon form, the enrollment clerks would divide the unified bill into as many separate bills as there were separate items of spending. Those bills would then be voted on together, but each would be presented separately to the President for his signature. In addition to the change in the mechanics of the line item veto, the new S. 4 added targeted tax benefits and new direct spending as subjects on which the President could exercise his veto. S4189. Sen. Dole emphasized that the new S. 4 was a consensus bill that took

into account the views of Sens. Bradley, Stevens, and others that all three types of spending should be covered. S4190. Sen. Domenici, a sponsor of S. 14, announced that he could support the Dole substitute in part because it applied to all types of spending. S4193. Sen. Bradley, who had previously questioned the lack of tax benefits in the old S. 4, also expressed support for the compromise. S4221-22.

On the Senate floor, Sen. Simon proposed an expedited judicial review amendment. S4244. Sen. McCain stated that he was "in agreement, except with one caveat:" that a severability clause be added so that if "one minor provision of the Act is declared unconstitutional, I would not want the entire Act to be declared unconstitutional." S4244-45. Shortly thereafter, the Senate agreed to the Simon amendment, which included the following severability provision:

> If any provision of this Act, or the application of such provisions to any person or circumstances is held unconstitutional, the remainder of this Act and the application of the provisions of such Act to any person or circumstances shall not be affected thereby.

141 Cong. Rec. S4259.

An important theme throughout the Senate floor debate was that the inclusion of the authority to item veto limited tax benefits and direct spending was an essential element of the ultimate compromise. *See, e.g.*, S4125-26 (Sen. Stevens, promising to fight for bill if amended to reach tax benefits and entitlements); S4123 (Sen. McCain); S4127 (Sen. Coats);

S4131 (Sen. Dorgan, tax provisions); S4161 (Sen. Reid, taxes); S4174 (Sen. Lott, tax deals); S4220 (Sen. Coats, tough negotiations to bring in tax and entitlement aspects); S4234 (Sen. Coats, describing direct spending and tax benefits); S4296 (Sen. Santorum, explaining bill "was drafted to have bipartisan support" and reached tax benefits and entitlements); S4301 (Sen. Bradley, acknowledging inclusion of tax benefits); S4303 (Sen. Wellstone, same); S4306 (Sen. Daschle, "I am gratified that our Republican colleagues agree with Democrats that tax breaks should be on the table."); S4316 (Sen. Lautenberg, same); S4356 (Sen. Coats, describing compromise reached between sponsors of S.4 and S.14 to include tax benefits); S4420 (Sen. Kyl, emphasizing importance in obtaining support from Democrats of tax benefits, lock box, and sunset provisions); S4464 (Sen. Exon, "critical areas of targeted tax benefits and entitlements"); S4477 (Sen. Heflin, acknowledging importance of compromise); S4478 (Sen. Biden, "a major improvement of this proposal . . . is that it includes . . . tax expenditures").

Similar to Rep. Slaughter's amendment to broaden the definition of tax benefits, Sen. Bradley, joined by Sens. Wellstone, Robb, Glenn, and Kohl, proposed an amendment to broaden the definition of tax benefits in S. 4. *See* S4301. Sen. McCain, however, opposed the Bradley amendment. S4306. In a colloquy between Sens. Bradley and McCain, Sen. McCain, nonetheless, pledged to fight in the Conference for stronger language on taxes than was currently in H.R. 2. *See* S4308. Shortly after that colloquy, Sen. Bradley's amendment was voted down by a very narrow margin, 50-48.

See S4323.[4]

A substitute "expedited rescission" alternative, which was very similar to S. 14, was introduced by Sens. Daschle, Exon, and Glenn, and a motion to table it passed by a vote of 62-38. *See* S4428. With more than sixty Senators voting to reject the "expedited rescission" substitute, passage of a separate enrollment bill was assured. When the final vote was taken on S. 4 on March 23, 1995, 69 voted in favor and 29 opposed. S4484-85.

By September 11, 1995, Conferees had been appointed, and OMB Director Rivlin, on behalf of the Administration, wrote to Majority Leader Dole to urge completion of the legislation and to reiterate the President's preference for enhanced rescission rather than separate enrollment as the strong form of line item veto. She also offered a few "technical improvements": (1) adopt a more workable definition of targeted tax benefits; (2) extend rescission authority to new direct spending, as the Senate had; (3) substitute the words "deny the availability of" and "suspend" for the use of "veto" and "repeal" in the tax benefit provision; (4) increase the time to exercise a veto from ten to twenty days; (5) include a severability provision; and (6) delete the three-judge court requirement. *See* Joint Appendix in *Raines v. Byrd*, at 91-93.

On March 21, 1996, nearly a year after different bills

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[4] Senator Daschle, Senate Minority Leader, later emphasized how important Sen. McCain's commitment to fight for inclusion of strong tax benefit language was to Democrats to garner their support for S. 4. S4354-55.

had passed both Houses, the Conferees reached agreement. *See* Line Item Veto Act, H.R. Conf. Rep. No. 491, 104th Cong., 2d Sess. (1996) (hereafter "Conf. Rep."). Other than using the bill number S. 4 as the vehicle, the conference version is quite similar to H.R. 2. First, the chosen form of the line item veto is not separate enrollment, but enhanced rescission. *Id.* The Conferees reduced to five days the time in which the President can exercise his veto authority after signing. *Id.* The President is given authority to "cancel" in whole any dollar amount of discretionary budget authority, any item of new direct spending, or any limited tax benefit. 2 U.S.C. § 691(a). With respect to discretionary budget authority, "cancel" is defined to mean "rescind." 2 U.S.C. § 691e(4)(A). With regard to items of new direct spending, such as new entitlements or increases in existing entitlements, and limited tax benefits, the term "cancellation" means "to prevent [the item] from having legal force or effect." 2 U.S.C. § 691e(4)(B), (C). The Conference Report states, "[t]he term 'cancel' is specifically chosen, and carefully defined in section 1026. The conferees intend that the President may use the cancellation authority *to surgically terminate federal budget obligations.*" Conf. Rep. at 20 (emphasis added).

As in the versions that passed both Houses, the President's authority in the enacted bill is not limited to items specified in the legislation itself. The veto power reaches not only the "entire dollar of budget authority" that is "specified in an appropriation law," but also amounts "required to be allocated by a specific proviso in an appropriation law for which a specific dollar figure was not included." 2 U.S.C. § 691e(7)(A)(i). The cancellation authority also extends to amounts "represented separately in any table, chart or

explanatory text included in the statement of managers or the governing committee report accompanying such law." 2 U.S.C. § 691e(7)(A)(ii).

Line item veto of "limited tax benefits" remains basically as it was enacted in both Houses. "Limited tax benefits" are "any revenue-losing provision" that provides a "deduction, credit, exclusion, or preference" to 100 or fewer taxpayers during any fiscal year, unless it is a transition provision, in which case the number of taxpayers is 10 or fewer. 2 U.S.C. § 691e(9)(A). Although the Conferees also included a judicial review provision, the severability provision added in the Senate was deleted, but with no explanation for its elimination. 2 U.S.C. § 692.

Not surprisingly, once agreement had been reached, the floor debates on March 27 and March 28, 1996, primarily explained what had already taken place. *See* 142 Cong. Rec. S2929-95 (daily ed.); 142 Cong. Rec. H2971-3028 (daily ed.). Testimonials were offered by those who supported the bill and by those who had once opposed it but now had changed their minds, pleased with the results of the Conference Committee's work. *See, e.g.*, 142 Cong. Rec. S2955 (Sen. Stevens) ("At my request, this bill has been expanded and broadened to cover not only appropriations for specific projects but tax breaks and entitlements as well."). One last effort was made to stop the bill on the Senate floor. Sen. Byrd moved to recommit the Conference Report with instructions to substitute S. 14 in its place. S2949. The motion was tabled by a vote of 58 to 42, and the bill passed 69-31. *See* S2995. The proceedings on the House floor also produced an unsuccessful attempt to recommit, H.3024-25, which failed by a vote of 192-228, followed by final passage

on a vote of 328 to 91, H3028, and signature by the President on April 9, 1996. *See* Public L. No. 104-130, 110 Stat. 1200 (1996).

ARGUMENT

I. THE LINE ITEM VETO ACT IS INSEVERABLE BECAUSE THERE IS ABUNDANT EVIDENCE THAT, BUT FOR THE INCLUSION OF TAX BENEFITS AND DIRECT SPENDING, THE ACT WOULD NOT HAVE BECOME LAW.

At issue in this case are the President's cancellation of a new item of direct spending (section 4722(c) of the Balanced Budget Act) and a limited tax benefit (section 968 of the Taxpayer Relief Act). Thus, the President's cancellation of a discretionary spending item has not yet been brought before this Court. Nonetheless, as we demonstrate in Part II, the Court should conclude that the entire Act is unconstitutional as applied to all three types of spending because it purports to give the President the power to unilaterally repeal portions of duly enacted laws. The power to permanently repeal laws, whatever their character, is a power subject to the "single, finely wrought and exhaustively considered" lawmaking process in Article I, and may not be circumvented without constitutional amendment. *See INS v. Chadha*, 462 U.S. 919, 951 (1983).

In the alternative, as we now show, the Court should hold that the entire Act must be stricken because the power to cancel tax benefits and entitlements is unconstitutional, and because the legislative history of the Act makes abundantly clear that Congress would not have passed the Act unless it

had made all three types of spending provisions subject to cancellation. *See Alaska Airlines, Inc. v. Brock*, 480 U.S. 678, 684-86 (1987). Under that approach, the Court would not need to reach the merits of the government's claim that Congress may delegate expansive powers over discretionary spending to the President, which is based on its contention that there are substantial historic antecedents supporting the discretionary spending provisions of the Act. *Cf. Chadha*, 462 U.S. at 931 n.7 (addressing severability question before constitutional question). Appellants' delegation argument has no relevance to the cancellation of direct spending items and limited tax benefits because there is no history for them remotely supportive of the Government's position. Indeed, the assertion of a power in the President, even with Congressional approval, to eliminate lawfully-vested tax benefits and entitlements, such as those at issue here, is wholly unprecedented. Therefore, by ruling that the three types of cancellations under the Act are inseverable, the Court could reserve for another day the question of whether a statute allowing the President to cancel only discretionary spending could pass constitutional muster.

The standard for severability of an unconstitutional provision is well-established: "Unless it is evident that the legislature would not have enacted those provisions which are within its power, independent of those which are not, the invalid part may be dropped if what is left is fully operative as a law." *Alaska Airlines*, 480 U.S. at 684 (severing legislative veto provision from Airline Deregulation Act); *see also Buckley v. Valeo*, 424 U.S. 1, 108 (1976) (per curiam) (quoting *Champlin Refining Co. v. Corporation Comm'n of the State of Georgia*, 286 U.S. 210, 234 (1932)). Here, there is no question that the power to cancel discretionary spending

items could remain "fully operative as a law" even if the tax benefits and new items of direct spending provisions were excised.

However, to sever the tax benefits and direct spending provisions and leave only discretionary spending would create a Line Item Veto Act which there is every indication that Congress would not have enacted. Since legislative intent is the touchstone of severability, *Alaska Airlines*, 480 U.S. at 684 n.5, it would do violence to the compromise reached in Congress and with the President to sever the tax benefit and direct spending provisions, leaving only the powers over discretionary spending. In the words of this Court in *Alaska Airlines*, the statute would not be able to "function in a manner consistent with the intent of Congress." *Id.* at 685. Thus, the answer to the question whether Congress would have passed this Act if it had known that it could not lawfully authorize cancellation of tax benefits is plainly "no." *See United States v. NTEU*, 115 S. Ct. 1003, 1025 (1995) (O'Connor, J. concurring in judgment and dissenting in part). *Amici* draw the Court's attention to six indicators of Congress's intent to include all three spending provisions as inseverable parts of the President's cancellation authority.

First, inclusion of the tax and direct spending provisions was critical to achieving compromise, both in the Senate, and between the Senate and House in the Conference. In the House, although the original tax benefit provision in H.R. 2 applied to provisions affecting only five or fewer taxpayers, it was broadened in committee to reach those benefitting 100 or fewer taxpayers. *See* H.R. Rep. No. 11, at 26-27. As a result, the Joint Committee on Taxation identified 79 tax benefits in the Taxpayer Relief Act of 1997

that fell under the definition of "limited tax benefits." *See* Pub. L. No. 105-34, § 1701, 111 Stat. 1099-1103. Perhaps even more significantly, in the Senate, two bills, S. 4 and S. 14, were introduced, but only S. 14, the expedited rescission version, reached tax benefits. *See supra* p. 4. As the bills moved through committee, however, it became evident that, unless tax benefit provisions were added to an enhanced rescission bill, there would be substantial support for S. 14, precisely because it reached tax benefits. Thus, when the Dole substitute (S. 4 as separate enrollment) was brought to the Senate floor, it contained tax benefit and direct spending provisions, in order to win the support of prominent supporters of S. 14 and others who likely would have opposed the original S. 4. *See supra* p. 11-13. Many would-be opponents of the old S. 4 (Sens. Bradley, Domenici and Stevens, for example) switched their support to the bipartisan compromise. Clearly, the new S. 4 was seen as an improvement over the original S. 4, in large part because of the inclusion of tax benefit and direct spending provisions.[5]

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[5] In fact, the legislative history demonstrates that, but for the inclusion of tax benefit and direct spending provisions in the Dole substitute, there would likely not have been votes for cloture on S. 4. Only after inclusion of these provisions in S. 4, were there sufficient votes in the Senate to table S. 14, and even then the vote was very close, considering that it only takes forty votes to block cloture. *See supra* p.14. Therefore, only by picking up votes by adding tax benefit and direct spending provisions, was there sufficient compromise to send an enhanced rescission bill to Conference. Indeed, after the Conference, when tax benefits were included in the final bill, a vote to table Sen. Byrd's expedited rescission

(continued...)

Second, Congress's objective in passing the Act was to control "special interest" spending. Thus, the critical importance of cancelling tax benefits as a means of achieving this goal was repeatedly stressed in hearings, committee reports, floor debate, and communications with the President's representatives. Numerous times Members observed that the proposed legislation was meritorious *precisely because* it addressed what was perceived to be the most pernicious form of special interest spending -- limited tax benefits. *See, e.g.*, H.R. Rep. No. 11, at 8. Specifically, a number of Members noted that any special interest lobbyists worth their salt know that the way to secure special benefits for their clients, is to secure tax breaks, rather than to seek discretionary spending, which is strictly controlled through pay-as-you-go caps and is under limitations in the budget growth control legislation. *See, e.g.*, S4125 (Sen. Stevens) ("If this bill is not expanded to allow the President to veto new entitlement programs or additions to direct spending programs, the new tools would be limited, and about 50 percent of the total spending would be put off limits."); H1116 (Rep. Slaughter) ("Every forward-looking lobbyist knows that tax breaks are the future of pork."); S4193 (Sen. Domenici) ("From a spending control perspective, the only portion of the budget that is under control is discretionary spending."). Other Members emphasized that tax breaks are more likely to benefit the wealthy and that the Act would receive their support precisely because it empowered the President to prevent such bold raids on the public fisc. *See*

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[5](...continued)
substitute garnered only 58 votes, still 2 short of the number needed to defeat cloture. *See supra* p. 16.

supra pp. 4, 8, 12-13.

Thus, severing the two provisions and leaving the one would frustrate the Congressional objective. In the words of this Court, severance would "alter the substantive reach of the statute" and change its "basic operation," two factors weighing against a ruling of severability. *See United States v. Jackson*, 390 U.S. 570, 586 (1968); *see also Regan v. Time, Inc.*, 468 U.S. 641, 653 (1984) (plurality) (severability depends on whether policies Congress sought to advance by enacting statute can be effectuated even though provision is unenforceable). In fact, if Congress had known that the only constitutional way to reach tax benefits was to adopt an expedited rescission alternative, there would likely have been wide support for pursuing expedited rescission so as not to risk losing the tax benefit provision altogether.

Third, there was substantial testimony in both the House and the Senate that inclusion of the tax provisions likely would risk invalidation of the statute on constitutional grounds. No less than four times during consideration of the Act did prominent authorities caution Congressional committees that allowing cancellation of tax benefits created that risk. Assistant Attorney General Dellinger gave the most forceful testimony about the constitutionality of extending the enhanced rescission power to targeted tax benefits. To avoid any constitutional defect, he recommended "recast[ing]" H.R. 2 to "eliminate[] the word 'veto' from the targeted tax benefit provision, and confer[] on the President the power to *suspend* (rather than 'repeal') such benefits." *See* Testimony of Walter Dellinger, *supra* p. 7; *see also* Testimony of Robert Reischauer, *supra* p. 4; Testimony of A. Schick, *supra* pp. 10-11. On behalf of the Administration, in her September

1995 letter to Majority Leader Senator Dole, OMB Director Rivlin recommended that the Conference substitute the word "suspend" for veto or repeal. *See* Rivlin Letter, *supra* p. 14. Despite all of these warnings, Members were so desirous of including tax benefits and direct spending with discretionary spending that Congress included all three spending items on an equal footing in the Act.

Fourth, even though amendments to further broaden the definition of tax benefits were defeated in both Houses, the debate surrounding those amendments makes clear that tax benefits were considered to be an integral part of the Act. *See supra* pp. 9, 13-14. Indeed, that debate revealed that the bill supporters considered it vital to reach compromise language on tax benefits in order to respond to objections that the original provisions did not go far enough. *See id.* Most significantly, Sen. McCain, a cosponsor of S. 4 and a conferee, pledged to Sen. Bradley during a floor colloquy to fight for strong language on tax benefits in Conference, 141 Cong. Rec. S4308, and only after that pledge was Sen. Bradley's amendment narrowly defeated. S4323. Indeed, at no time did anyone question that tax benefits were an integral feature of the Act. *Compare Alaska Airlines*, 480 U.S. at 691-93 (legislative history demonstrates scant attention to unconstitutional legislative veto provision held to be severable).

Fifth, the President's representatives repeatedly weighed in with requests that tax benefit and direct spending provisions be included in any bill. *See* Testimony of Alice Rivlin, *supra* pp. 5,6 *see also* Rivlin Letter, *supra* p. 14. In a March 20, 1995 letter to the Senate, President Clinton urged passage of a bill containing tax as well as spending provisions,

141 Cong. Rec. S4186 (Sen. McCain), and in his signing statement, the President emphasized that the Act allowed him to reach both spending and taxes. *See Statement by President Upon Signing S. 4, Line Item Veto*, 1996 WL 165190 (April 9, 1996).

Sixth, the severability provision that had been added to S. 4 in the Senate was deleted in Conference. It is normally true that the absence of a severability clause "is just that -- silence -- and does not rouse a presumption of severability." *See Alaska Airlines*, 480 U.S. at 686 (citations and internal quotations omitted). In this case, however, a severability clause agreed to on the Senate floor by bill sponsor and conferee Sen. McCain was nonetheless removed in the Conference Committee, giving rise to a strong inference that Congress did not intend to allow for severability of any significant portion of the Act. Therefore, this is not a case like *New York v. United States*, 505 U.S. 144 (1992), where Congressional silence on severability was appropriately taken not to create a presumption either way. *Id.* at 186-87. Indeed, the severability clause was removed in Conference despite a specific request from the Administration that it be included in the final bill. *See* Rivlin Letter, *supra* p. 14.

The touchstone of severability is legislative intent. Here, where there is abundant evidence that but for the inclusion of all three spending items, Congress would not have passed any line item veto bill; that the tax benefits provision was of critical importance to so many of the bill's proponents, that Congress deliberately set aside warnings that the statute would be on uncertain constitutional ground if they included tax benefits, and, finally, in Conference Committee, that the severability provision was removed, Congress's intent

to enact an inseverable statute is overwhelming. To sever the direct spending and tax benefit provisions, while leaving the discretionary spending provision, would create a statute that there is no evidence Congress would have passed. *Compare Alaska Airlines*, 480 U.S. at 691-93 (legislative history supports conclusion that Congress would have passed labor protection provisions of Airline Deregulation Act even without legislative veto provision); *Jackson*, 390 U.S. at 585-91 (history of enacting Federal Kidnapping statute demonstrated that Congress would have enacted the statute even without the death penalty).

Unlike in *Alaska Airlines*, *Jackson* or other severability cases, where there were good reasons to conclude that Congress would have passed the same Act, even without the offending provision, there is no evidence that Congress would have passed the Line Item Veto Act without the critically important tax and direct spending provisions as integral features.

II. THE LEGISLATIVE CHARACTER OF THE CANCELLATION POWER GRANTED UNDER THE ACT DEMONSTRATES THAT THE ACT IS AN UNCONSTITUTIONAL EXPANSION OF THE PRESIDENT'S ARTICLE I POWERS.

As *Amici* see the basic dispute in this case, the constitutionality of the Line Item Veto Act depends on whether the power of cancellation given to the President is a legislative or executive function. If it is the former, then it cannot stand because the Constitution limits the President's legislative powers to those set forth in Article I, § 7, which appellants admit do not include a line item veto. On the other

hand, if the cancellation authority is no more than a typical Article II administrative power to "Take Care that the Laws be faithfully executed," then it is constitutional.

Rather than repeating the full range of merits arguments, *Amici* will respond only to the principal claim of appellants and their *amici* that the Act is no different from a variety of other statutes which they contend are constitutional. At the outset we note that many of the laws relied on have never been reviewed by this Court or, in most cases, any other court, and some of the powers have never even been exercised. Thus, they are precedents for the Act in only the most tenuous manner. But regardless of whether they have been reviewed, none of them creates powers for the President that approach the legislative power of cancellation contained in the Act. In particular, there are five essentially legislative features of the cancellation power that distinguish it from powers created by these other laws.

First, and most significant because it separates the power of cancellation from the powers granted in most of the laws cited by appellants, decisions to cancel are permanent and may be reversed only by a new law. *See* 2 U.S.C. § 691b(a). As this Court observed in *Chadha*, a governmental action is assessed for separation of powers purposes "by the character of the . . . action it supplants." 462 U.S. at 952. Thus, because a cancellation supplants a part of a law, and in turn can only be supplanted by a new legislative act of Congress, passed under Article I, the cancellation power is legislative, in contrast to the vast array of administrative decisions that can be replaced by other administrative decisions made by officials of the executive branch under Article II.

Second, there are only five days within which a cancellation may be exercised. *See* 2 U.S.C. § 691a(B), 691a(C)(1). Most delegations have no time limits at all, and we are aware of none that has so short a time frame, let alone one that is tethered to the law's enactment. A cancellation may be made the instant that a bill becomes a law, and it has the same real-world effect as if the President struck the cancelled item before the bill became a law. Moreover, the cancellation power may be used only if the President signs the bill, 2 U.S.C. § 691(a), but not if it becomes a law by a veto override or a lapse of time without his signature. These uniquely legislative features further support the conclusion that the line item veto is essentially a legislative power.

Third, in large part because of the timing limitations, there are no unknown conditions on which the exercise of the power to cancel might depend. Under the Act, cancellation is not predicated on contingencies depending on the actions of a third party (such as another country in the tariff cases), or on the needs of an executive department to carry out its mission (the early department budget laws and the reorganization acts), or on whether the appropriated funds can be usefully spent (the Anti-Deficiency Act). Congress knows everything that the President knows, yet the Act gives him the final say on which portions of the law shall remain operative. His cancellation power is thus not the power to administer the law, but the power to determine which portions of the law shall live and which shall die, precisely what each House of Congress does when it legislates and determines which provisions to include in a bill.

Fourth, the only limitations imposed by the Act -- that the cancellation reduce the deficit, not impair essential federal

government functions nor harm the national interest, 2 U.S.C. § 691(a)(A), -- are, for all practical purposes, no limits at all. In contrast, in most of the statutes relied on, there are considerable constraints on the exercise of the delegated power, either because of required findings that must precede the exercise of a power, or because the range of options is narrow, or for other reasons. Moreover, the exercise of the power of cancellation is entirely discretionary -- the President can cancel every item covered by the Act, none, or any combination in between -- as he and he alone decides. Furthermore, the only arguably substantive limitations under the Act are no more than a restatement of what every President does when he decides whether to exercise his constitutional veto power under Article I, § 7 -- determine whether an item (instead of an entire bill) is in the national interest. In these respects, the President's essentially unfettered choice on which items to cancel mirrors his choice on which bills to veto in their entirety, thereby lending additional support for the conclusion that the power to cancel is legislative and not executive.

Fifth, other than a constitutional challenge, there is no judicial check on the exercise of the power of cancellation. Although appellants and their *amici* rely heavily on note 16 in *Chadha*, they conveniently omit the sentence contrasting the legislative veto with routine administrative action: "That kind of [routine] Executive action is always subject to check by the terms of the legislation that authorized it; and if that authority is exceeded it is open to judicial review as well as the power of Congress to modify or revoke the authority entirely." 462 U.S. at 953-54 n.16. By contrast, under the Act, cancellation is almost *never* (not *always*) subject to check because there are essentially no limitations on the power to cancel, and there is

no judicial review, not only because there is none provided for, but because there would be nothing for a court to review since the Act contains no "check by the terms of the legislation," as *Chadha* envisions for an "Executive action." Just as the legislative power of the President to sign or veto an entire bill is not subject to judicial review, neither is his choice of which items covered by the Act should be cancelled, confirming once again that cancellation is essentially a legislative, not executive, action.

It may be that, standing alone, a law that contained one of the foregoing features -- it authorized the President to take actions that are permanent and irrevocable, required that actions be taken immediately after passage, required that actions be based on conditions also known to Congress, required that actions be based on extremely broad standards, or exempted the President's actions from judicial review -- would be constitutional. The difference here is that the Act has not merely one or two, but every one of these essentially legislative features, unlike every other law cited by its supporters. Indeed, other than the fact that the power to cancel is exercised by the President, there is *nothing* about it of an executive, rather than legislative, character. It is for these reasons, as well as those given by appellees and their supporting *amici*, that the Line Item Veto Act is unconstitutional.

CONCLUSION

This Court should affirm the decision of the district court and declare the Line Item Veto Act of 1996 unconstitutional.

Respectfully submitted,

Alan B. Morrison
(Counsel of Record)
Colette G. Matzzie
Public Citizen Litigation Group
1600 20th Street, NW
Washington, D.C. 20009
(202) 588-1000

Attorneys for Amici
Representatives Henry A.
Waxman, David E. Skaggs,
and Louise M. Slaughter

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1997

WILLIAM J. CLINTON, *et al.*,

Appellants,

vs.

CITY OF NEW YORK, *et al.*,

Appellees.

ROBERT E. RUBIN,

Appellant,

vs.

SNAKE RIVER POTATO GROWERS, INC., *et al.*,

Appellees.

On Appeal from the United States District Court for the District of Columbia

BRIEF OF THE ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK AS *AMICUS CURIAE* IN SUPPORT OF APPELLEES

ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK
42 West 44th Street
New York, New York 10036-6690
(212) 382-6600
LOUIS A. CRACO, JR., Chair
JAMES F. PARVER
Committee on Federal Legislation

DAVID P. FELSHER
Counsel of Record

145657

(800) 274-3321 • (800) 359-6859
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Lutz Appellate Services, Inc.

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INTEREST OF AMICUS[1]

The Association of the Bar of the City of New York (the "Association") is a professional association of more than 21,000 attorneys, the majority of whom practice in New York City. The Association is chartered to study, address and promote the rule of law and, where appropriate, the reform of the law. The Association, by its Committee on Federal Legislation, has followed attempts in recent years to enact line item veto legislation[2] and has carefully studied the Line Item Veto Act, 2 U.S.C. §§ 691, *et seq.* (Supp. II 1996) (the "Act"). For the reasons set forth below, the Association believes that the Line Item Veto Act is an effort to accomplish an unconstitutional end by unconstitutional means. If upheld, the Act will undermine, in fundamental and dangerous ways, the Constitution's mechanism for federal lawmaking. With the attached consent of the parties, the Association of the Bar of the City of New York respectfully submits this brief as *amicus curiae* and urges the Court to strike down the Act.

SUMMARY OF ARGUMENT

The Act offends the Constitution in several ways. First, the Act rearranges the very structure of our government, taking significant responsibilities from Congress and transferring them to the Executive. The allocation of power between these branches is laid out in detail in the Constitution and Congress cannot change that structure by legislative fiat. Revisions of this nature and magnitude require an amendment to the Constitution. Second, by transferring to the President the power

1. Pursuant to Rule 37.6, this brief was authored and prepared in its entirety by the Association of the Bar of the City of New York.

2. The Committee's published opinion on an earlier line item veto bill was read into the Congressional Record. 141 Cong. Rec. S4443-4449 (daily ed. Mar. 23, 1995). The Association by the Committee filed an *amicus curiae* brief in *Raines v. Byrd*, 117 S. Ct. 2312 (1997).

unilaterally to cancel portions of existing law, the Act violates the Presentment Clause and undermines the bicameral structure of Congress and the separation of powers. Furthermore, the Act is an impermissible effort by Congress to delegate to the President its most basic duty -- to determine what the law shall be. As such, it radically upsets the constitutionally contemplated process of political compromise within the legislative branch and between the legislative and executive branches. Third, the Act establishes rules of procedure for succeeding Congresses, thereby violating the Rules Clause.

ARGUMENT

I.

THE ACT VIOLATES THE PRESENTMENT CLAUSE AND OFFENDS THE PRINCIPLES OF BICAMERALISM AND SEPARATION OF POWERS

The Constitution diffuses power on several levels. Power is divided between the federal and state sovereigns. Federal power is further diffused among three branches and legislative power is reposed in two separate chambers. The separation of powers among the different branches of the federal government is at "the heart of our Constitution." *Buckley v. Valeo*, 424 U.S. 1, 119 (1976).[3]

The processes by which these branches bring their diffused power to bear on federal law is spelled out in detail in the Constitution. As set forth below, the Line Item Veto Act impermissibly tampers with these processes and fundamentally realigns the Constitution's diffusion of power.

3. The separation of powers doctrine is not merely to protect each branch from encroachments by the other two branches, but to protect the people from the undue concentration of power in any one branch. Carl McGowan, *The President's Veto Power: An Important Instrument of Conflict in Our Constitutional System*, 23 San Diego L. Rev. 791, 812 (1986); *see generally The Federalist* No. 47, at 301 (James Madison) (Clinton Rossiter ed., 1961).

A. Congress May Not Legislatively Alter the Lawmaking Requirements of Article I

This Court has stated that any fundamental change in the constitutional framework "must come not by legislation adopted either by Congress or by an individual State, but rather . . . through the amendment procedures set forth in Article V." *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 837 (1995).

Article I, § 1 vests federal legislative power exclusively in a bicameral Congress. The Presentment Clause, Art. I, § 7, cl. 2, prescribes the precise procedures by which that legislature may make law:

> Every Bill which shall have passed the House of Representatives and the Senate, shall, before it becomes a Law, be presented to the President of the United States; If he approve he shall sign it, but if not he shall return it, with his Objections to that House in which it shall have originated, who shall enter the Objections at large on their Journal, and proceed to reconsider it. If after such Reconsideration two thirds of that House shall agree to pass the Bill, it shall be sent, together with the Objections, to the other House, by which it shall likewise be reconsidered, and if approved by two thirds of that House, it shall become a Law. . . .[4]

4. Exceptions to this procedure are carefully spelled out in the Constitution. Examples include the Senate's confirmation of Presidential appointments pursuant to Article II, § 2, cl. 2; the Senate's ratification of treaties pursuant to Article II, § 2, cl. 2; the sole power of the House of Representatives to initiate impeachment proceedings pursuant to Article I, § 2, cl. 5; the sole power of the Senate to hold trials and to convict following impeachment charges by the House of Representatives pursuant to Article I, § 3, cl. 6; the role of Congress in the election of a President pursuant to Article II, § 1 and the Twelfth Amendment; and the proposal of a constitutional amendment for submission to the states pursuant to Article V. *See Immigration and Naturalization Service v. Chadha*, 462 U.S. 919, 955-56 and 955-56 n.21 (1983). Furthermore, each house has the power to act alone in handling certain specified matters. *See* Art. I, § 5.

The Presentment Clause thus requires that a bill first be passed in identical form by both the House and the Senate and then be presented to the President. The President must then either (i) sign the *entire* bill into law, (ii) veto the *entire* bill and send the *entire* bill back to Congress for reconsideration; or (iii) do nothing, in which case the *entire* bill becomes law after ten days, unless Congress adjourns within that time. Art. I, § 7, cl. 2.

The legislative steps outlined in Article I are not empty formalities; they are commands which simultaneously require and limit the participation of both houses of Congress and the President in lawmaking. As such, they may be altered only by constitutional amendment. *See Immigration and Naturalization Service v. Chadha*, 462 U.S. 919, 958 n.23 (1983) ("Chadha"). In *Chadha*, this Court explained:

> Explicit and unambiguous provisions of the Constitution prescribe and define the respective functions of the Congress and of the Executive in the legislative process. . . . These provisions of Art. I are integral parts of the constitutional design for the separation of powers. . . . "[T]he principle of separation of powers was not simply an abstract generalization in the minds of the Framers: it was woven into the document that they drafted in Philadelphia in the summer of 1787." *Buckley v. Valeo*, 424 U.S., at 124. . . . [T]he Framers were acutely conscious that the bicameral requirement and the Presentment Clauses would serve essential constitutional functions. . . . It emerges clearly that the prescription for legislative action in Art. I, §§ 1, 7, represents the Framers' decision that the legislative power of the Federal Government be exercised in accord with a single, finely wrought and exhaustively considered, procedure.

Id. at 945-51.

The Line Item Veto Act effects fundamental changes to that "finely wrought and exhaustively considered, procedure." Wholly apart from the damage such changes would do to the Nation, it is clear that they cannot be achieved by statute. To change the very structure of its government by permitting a line item veto, this Nation must amend its Constitution. It has not.

B. The Line Item Veto Upsets the Constitutional Balance of Power

The Line Item Veto Act upsets the constitutional framework by transforming the President's limited power -- the veto of entire bills -- into a qualitatively different and far greater one -- the unilateral power to determine that only parts of enacted bills shall be the law of the land. Indeed, the very purpose of the Act is to give the President this dramatically expanded power to change enacted law, rather than merely to execute it. The Act therefore violates the Presentment Clause and scrambles the constitutional principles of separation of powers and bicameralism.

The Constitution decrees that to make, modify or repeal federal law, a bill must be approved by both houses of Congress. That bill may then be signed into law *in its entirety*; allowed to become law *in its entirety* by virtue of the President's inaction for ten days; or enacted into law *in its entirety* by both houses of Congress overriding a Presidential veto. Art. I, § 7, cl. 2.

The language of Article 1, § 7, cl. 2 makes plain that bills are to be approved or disapproved and returned and reconsidered *in toto*, not in part. Consequently, if the President wishes to prevent a bill from becoming law, the President must return it in its *entirety* to Congress for *reconsideration* or refuse to sign the *entire* bill.[5] The Constitution does not authorize the President

5. The Presentment Clause uses the term "it" or "its" 12 times, refers to "the Bill" twice, and uses the term "reconsider" or (Cont'd)

to accept part of a bill and reject the rest. The *in toto* requirement prevents any of the participants from unilaterally revising that which has been approved by the others and ensures that the bill that becomes law is the *same* bill that was passed by both houses of Congress.[6]

The Line Item Veto Act disregards this constitutional mandate by authorizing the President to sign an entire bill into law and then to immediately repeal portions of it — in other words, to exercise a partial veto. Congress cannot constitutionally give the President the power to veto portions of a bill presented by Congress and then sign others into law, as appellants herein have conceded. (*See* Brief for the Appellants at 34.)[7] The Line Item Veto Act, however, accomplishes the same result. It allows bills to become law in a different form than that which majorities in the House and the Senate passed.

(Cont'd)
"reconsideration" three times. From the context in which those terms are used, "it", "its", and "the Bill" plainly refer to "Every bill which shall have passed the House of Representatives and the Senate." In addition, the last sentence of the Presentment Clause refers to "any bill" not returned by the President within ten days of presentment and to "the same."

6. *Accord*, Letter from George Washington to Edmund Pendleton (Sept. 23, 1793) in 33 *The Writings of George Washington*, 94, 96 (John C. Fitzpatrick ed. 1940) ("From the nature of the Constitution, I must approve all the parts of a Bill, or reject it in toto"); William H. Taft, *The Presidency: Its Duties, Its Powers, Its Opportunities and Its Limitations*, at 11 (1916) (The President "has no power to veto part of the bill and allow the rest to become a law").

7. In *Raines v. Byrd*, 117 S. Ct. 2312 (1997), the defendants and their *amici* conceded this same point in the Supreme Court. *See* Brief for the Appellants, at 34; Joint Brief of the United States Senate and the Bipartisan Legal Advisory Group of the United States House of Representatives as *Amici Curiae* for Reversal, at 18.

As this Court has recognized:

> By providing that no law could take effect without the concurrence of the prescribed majority of the Members of both Houses, the Framers reemphasized their belief . . . that legislation should not be enacted unless it has been carefully and fully considered by the Nation's elected officials.

Chadha, 462 U.S. at 948-49. That requirement lies at the heart of bicameralism. Yet the Line Item Veto Act sweeps that fundamental constitutional principle aside. The law that takes effect after the President exercises the line item veto is different from the one passed by both houses of Congress. It is one that was never even considered, much less passed, by both houses of Congress.

Appellants argue that the Line Item Veto Act and the bill that has been dissected by the line item veto both pass constitutional muster because for a brief moment the latter bill, in its entirety, is signed into law. *See* Brief for the Appellants, at 34-35. This argument, however, not only elevates form over substance by ignoring the reality of what occurs, but also ignores the requirement of the Presentment Clause that Congress be allowed to *reconsider* a bill in its *entirety* whenever the President's rejection prevents the bill passed by both houses of Congress from being the law of the land[8]. This Court has indicated that the opportunity for reconsideration by Congress of a rejected bill is an essential element in the legislative scheme provided by the Constitution. *Wright v. United States*, 302 U.S. 583, 596 (1938) ("Where the President does not approve a bill, the plan of the Constitution is to give to the Congress the opportunity to consider his objections and to pass the bill despite his disapproval"); *see also Raines v. Byrd*, 117 S. Ct. at 2325-26 (Stevens, J., dissenting).

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8. The sole exception to this requirement is in the case of a pocket veto, when Congress's adjournment prevents the return of the bill.

The Line Item Veto Act also contravenes two other mandates of the Presentment Clause. First, although the Presentment Clause limits the President to only ten days to veto a bill after receiving it, the Line Item Veto Act impermissibly extends that time period. The President can, for example, wait until the tenth day after a bill is presented to sign it into law and then wait five additional days before exercising the line item veto, *see* 2 U.S.C. §§ 691(a)(B) & 691a(c)(1) (Supp. II 1996); *see also* 2 U.S.C. § 691b(a) (Supp. II 1996). Second, although the Presentment Clause requires that the President's objections to a bill be entered in the journal of the house originating the bill, the Line Item Veto Act provides that the President's cancellations be published in the Federal Register. *See* 2 U.S.C. § 691a(c)(2) (Supp. II 1996).

The Line Item Veto Act also significantly changes the political gravity of the federal government. The Constitution contemplates, and the history of our Nation has always involved, a process of give and take between members of Congress and between Congress and the White House. The Line Item Veto Act undercuts this tradition by providing the President with a new and powerful club to wield over each individual member of Congress -- the authority to cancel expenditures of particular interest to that member, even after both houses have passed them and the President has signed them -- unless the member accommodates the President's wishes in other matters. To be confident that any expenditure would survive a line item veto, each member would be forced to horse-trade with the President directly, as well as with other members, during the process of Congressional consideration of each expenditure. This effectively transforms the President into a superlegislator -- a result which stands the Framers' "finely wrought" system on its head.

President Taft expressed grave concerns over affording the President the extraordinary power of a line item veto:

> Still, I think the power to veto items in an appropriation bill might give too much power to the President over congressmen. It is wiser to leave the remedy for the above to the action of the people in condemning at the polls the party which becomes responsible for such riders than to give, in such a powerful instrument, a temptation to its sinister use by a President eager for continued political success.

William H. Taft, *The Presidency: Its Duties, Its Powers, Its Opportunities and Its Limitations, supra*, at 20.

Such an unprecedented accumulation of power in the President's hands fundamentally alters the nature of the lawmaking dialogue between the branches and, to some extent, transfers the ultimate power of the purse from the legislature to the executive.[9]

This reality also belies the notion that the line item veto is limited to certain budgetary matters. While the Act restricts the use of the line item veto to budgetary matters, it is obvious that the President can use the threat of a line item veto to coerce cooperation from individual members of Congress on non-budgetary issues.

C. The Act is an Unconstitutional Attempt to Delegate Congressional Authority

This Court has repeatedly held "the lawmaking function belongs to Congress, U.S. Const., Art. 1, §1, and may not be conveyed to another branch or entity." *Loving v. United States*, 116 S. Ct. 1737, 1744 (1996). Accordingly, "Congress

9. The Framers feared combining the power of the purse with the power of the sword. *See The Federalist* No. 58, at 359 (James Madison) (Clinton Rossiter ed., 1961) ("[t]his power over the purse may, in fact, be regarded as the most complete and effectual weapon with which any constitution can arm the immediate representatives of the people. . . .").

manifestly is not permitted to abdicate, or to transfer to others, the essential legislative functions with which it is . . . vested." *Panama Refining Co. v. Ryan*, 293 U.S. 388, 421 (1935). "[I]t is a breach of the National fundamental law if Congress gives up its legislative power and transfers it to the President. . . ." *J.W. Hampton, Jr., & Co. v. United States*, 276 U.S. 394, 406 (1928); *see also Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 655 (1952) (Jackson, J., concurring) ("The Executive, except for recommendation and veto, has no legislative power"); *Field v. Clark*, 143 U.S. 649, 692 (1892) ("That Congress cannot delegate legislative power to the President is a principle universally recognized as vital to the integrity and maintenance of the system of government ordained by the Constitution").

The power to repeal or amend existing law is indisputably a legislative power, which the Constitution vests solely in the Congress. *See* Art. I, § 1; *Chadha*, 462 U.S. at 954. The Line Item Veto Act is an unprecedented attempt by Congress to alienate that basic legislative function. As the District Court explained in *Byrd v. Raines*, 956 F. Supp. 25 (D. D.C.), *vacated and remanded on standing grounds*, 117 S. Ct. 2312 (1997):

> the cancellation power conferred by the Act is indeed *revolutionary. . . . Never before* has Congress attempted to give away the power to shape the content of a statute of the United States, as the Act purports to do. *As expansive as its delegations of power may have been in the past, none has gone so far as to transfer the function of repealing a provision of statutory law.*

Id. at 37 (emphasis added). *See also City of New York v. Clinton*, 985 F. Supp. 168, 181 (D. D.C. 1998) ("The Line Item Veto Act impermissibly crosses the line between acceptable delegation of rulemaking authority and unauthorized surrender to the President of an inherently legislative function, namely, *the authority to permanently shape laws and package legislation*") (emphasis added).

Moreover, Article I, § 1 vests all legislative power in Congress. Executive power is limited to faithfully executing the laws. *See* Art. II, § 3. As this Court explained in *Youngstown Sheet & Tube Co.*, 343 U.S. at 587:

> In the framework of our Constitution, the President's power to see that the laws are faithfully executed refutes the idea that he is to be a lawmaker. The Constitution limits his functions in the lawmaking process to the recommending of laws he thinks wise and the vetoing of laws he thinks bad. And the Constitution is neither silent nor equivocal about who shall make laws which the President is to execute.

The Line Item Veto Act violates this fundamental principle by granting to the President the power to be the lawmaker. The Act authorizes the President to pick and choose among portions of enacted law and determine which pieces shall remain the law. Congress has thus impermissibly granted the President the essential legislative power of amending existing law.

Appellants attempt to characterize the Act as a delegation to the President of authority not to spend duly appropriated money subject to "intelligible principles" articulated in the Act. Brief for the Appellants, at 44-49. This Court's holding in *J.W. Hampton*, however, illustrates that "intelligible principles" delegations differ significantly from this unconstitutional attempt by Congress to divest itself of fundamental lawmaking power. There, Congress had authorized the President to raise or lower import tariffs to equalize differences which, after factual investigation, the President found to exist between foreign and domestic production of similar products. 276 U.S. at 404-05. Because Congress lacked information about "changing conditions" necessary to make the required adjustments, the delegation was permitted "to give effect to the principle on which the statute proceeds." *Id.* Chief Justice Taft explained:

> The true distinction, therefore, is, between the delegation of power to make the law, which necessarily involves a discretion as to what it shall be, and conferring an authority or discretion as to its execution, to be exercised under and in pursuance of the law. The first cannot be done; to the latter no valid objection can be made.

Id. at 407, *quoting Cincinnati, Wilmington & Zanesville Rail Road Co. v. Commissioners of Clinton County*, 1 Ohio St. 77, 88-89 (1852).

Similarly, in *Field v. Clark*, *supra*, 143 U.S. 649, Congress authorized the President to suspend temporarily the duty-free importing of specified goods if he found a country producing those goods imposed reciprocally unequal or unreasonable duties upon United States products. "Nothing involving the expediency or the just operation of such legislation was left to the determination of the President." *Id.* at 693. Congress determined when the law would be suspended and merely left it to the President to determine when, and if, those conditions arose. Faithfully adhering to this principle, this Court has from time to time permitted Congress to allow the Executive branch to provide technical expertise or determine whether certain specified conditions had occurred. *See, e.g., Federal Energy Administration v. Algonquin SNG, Inc.*, 426 U.S. 548, 559 (1976) (President authorized to adjust petroleum imports by imposing license fees upon actual findings that specified considerations had been met); *Yakus v. United States*, 321 U.S. 414, 423-25 (1944) (Executive may set price ceilings upon making specific factual determinations.)

No such circumstance exists here. Congress is certainly able -- indeed, is constitutionally required -- to decide which spending items and tax benefits should be enacted into law and which should not. The Line Item Veto Act does not simply entitle the Executive branch to find facts, to discern contingencies or to apply expertise -- it invites the President to exercise discretion,

unbound by any real parameter, to retain parts of duly enacted legislation and to repeal others. In short, it is governed by no "intelligible principle" at all. This Court has never sanctioned so broad a Congressional abdication of authority and should not now.

If the Court upholds the power of statutory repeal, which the Act gives to the President, Congress will be free to provide the President with the power to rescind any existing law. There is no tenable constitutional distinction between the "delegation" here and Congress delegating authority to repeal civil rights laws, minimum wage laws, laws protecting health and the environment, or the criminal code.

II.

THE ACT VIOLATES THE RULES CLAUSE

The Rules Clause of the Constitution provides that "Each House may determine the Rules of its Proceedings. . . ." Art. I, § 5, cl. 2. The Line Item Veto Act is inconsistent with the Rules Clause for two reasons. First, under the Act, one Congress is establishing procedural rules for the expedited consideration of disapproval bills by succeeding Congresses, thus precluding each chamber in succeeding Congresses from setting its own rules. Second, the Act allows the President to determine the items to be canceled and thus limits the content of expedited disapproval bills. *See* 2 U.S.C. § 691 (Supp. II 1996).

The Rules Clause explicitly states that each house may determine its *own* rules of proceedings. Art. I, § 5, cl. 2. That means that the membership of each chamber, sitting at the time, must have the ability to determine that chamber's internal rules. *Cf.* 103 Cong. Rec. 178 (1957) ("the right of a current majority of the Senate at the beginning of a new Congress to adopt its own rules, stemming as it does from the Constitution itself, cannot be restricted or limited by rules adopted by a majority of the Senate in a previous Congress"); 99 Cong. Rec. 215

(1953) ("the Senate has a right, under the Constitution of the United States, to adopt its own rules for every Congress"); 99 Cong. Rec. at 219, 221. Thus, one Congress cannot prevent the houses of a succeeding Congress from changing their rules of proceedings. *See United States v. Ballin*, 144 U.S. 1, 5 (1892) ("[t]he power to make rules is not one which once exercised is exhausted. It is a continuous power, always subject to be exercised by the house, and within the limitations suggested, absolute and beyond the challenge of any other body or tribunal").

Thus, each chamber has the power and authority to set its own rules regarding a variety of internal matters.[10] The problem with legislation, such as the Act, which restricts the rulemaking power of either chamber is that such legislation can only be abrogated or amended by a subsequent piece of legislation. The second piece of legislation must be passed by *both* chambers and either approved by the President or enacted over the President's veto. This is contrary to the Rules Clause. Legislation, such as the Act, affecting the internal rulemaking power of either chamber also results in one chamber of Congress exercising partial control over the internal rules of the other chamber. While the Constitution grants each chamber the power to set its own rules, that power can only be exercised in conformity with constitutional constraints. *See United States v. Ballin, supra,* 144 U.S. at 5; *United States v. Smith*, 286 U.S. 6, 33 (1932).

Several subsections of the Act violate the Rules Clause by controlling Congress's internal rules and procedures, as well as the form and content of bills.

Subsection 691d(a) specifies particular committees within both the House and Senate to which the President's special

10. *See e.g.*, Rules of the House of Representatives in *Constitution, Jefferson's Manual and Rules of the House of Representatives of the United States*, 104th Cong. (1995) (House Doc. No. 103-42); Senate Manual, 104th Cong., 1st Sess. (1995) (Senate Doc. No. 104-1).

message shall be referred. Committee referral is a matter regarding the internal organization and procedures of each chamber and the Act's attempt to establish matters of committee referral for succeeding Congresses violates the Rules Clause.

Subsection 691d(b) sets forth certain time parameters within which Congress must act upon any expedited disapproval bill. Such time parameters prevent succeeding chambers from setting their own calendars and determining when and which bills shall be heard or voted upon, another clear violation of the Rules Clause.

Subsections 691d(d) and (e), which deal with consideration in the House and the Senate, respectively, also violate the Rules Clause by controlling Congress's internal rules and procedures. Subsection (d), for example, limits debate in the House on disapproval bills, precludes motions to reconsider a vote and restricts the making of other motions. Subsection (e) imposes similar limitations on proceedings in the Senate.

Finally, subsection 691d(f) infringes on the ability of each chamber to determine its own rules of proceedings with respect to a conference report. In connection with the House's consideration of a conference report, subsection (f)(2) limits debates and debatable motions and a motion to recommit is not in order. Similarly, in connection with the Senate's consideration of a conference report, subsection (f)(3) limits debate and a motion to recommit is not in order. Finally, subsection (f)(4) places limits on the contents of certain bills when there are disagreements in amendments to disapproval bills and certain other amendments in the nature of a substitute.

CONCLUSION

The Line Item Veto Act transfers to the President the fundamental legislative power of deciding what programs should exist. For over 200 years our system of government, as framed by the Constitution, has been just the opposite. The purpose of the Line Item Veto Act is a truly revolutionary attempt to spare Congress difficult decisions about which programs should exist by having the President make those decisions in its stead. Upholding this effort would place the entire system of federal lawmaking, and the separation of powers itself, in grave jeopardy. This Court must, on this occasion, protect Congress from itself, and thereby protect the Nation.

Respectfully submitted,

ASSOCIATION OF THE BAR OF THE
CITY OF NEW YORK
42 West 44th Street
New York, New York 10036-6690
(212) 382-6600
LOUIS A. CRACO, JR., Chair
JAMES F. PARVER
Committee on Federal Legislation

DAVID P. FELSHER
Counsel of Record

[redacted]

[redacted]

[redacted]

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BRIEF OF SENATORS ROBERT C. BYRD, DANIEL PATRICK MOYNIHAN, AND CARL LEVIN AS *AMICI CURIAE* IN SUPPORT OF APPELLEES

INTEREST OF AMICI[1]

The Constitution vests legislative responsibility in a bicameral Congress subject to a limited check by the President. The Line Item Veto Act of 1996 upsets this careful allocation of authority by granting to the President a unilateral power to amend or repeal legislation. As members of the United States Senate, amici have a strong interest in preservation of the Constitution's "single, finely wrought and exhaustively considered, procedure," *INS v. Chadha*, 462 U.S. 919, 951 (1983), for making laws.

STATEMENT

When Congress presents the President with a bill under Article I, section 7 of the Constitution, the bill can become law in one of three ways: the President can sign it; he can let it become law without his signature; or, if the President vetoes the bill by returning it with his objections, Congress can override the veto by a two-thirds vote in each House. These requirements govern "[a]mendment and repeal of statutes, no less than enactment" of them. *INS v. Chadha*, 462 U.S. at 954.

The Act gives the President item veto authority only over bills he has "signed into law." 2 U.S.C. § 691(a); *see also id.* § 691e(1) (appropriations "signed into law"); *id.* § 691f(c) (tax bills "signed into law"). He cannot strike items in bills that become law without his signature or as a result of veto overrides.

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[1] Statement pursuant to Rule 37.6: No part of this brief was authored by counsel for any party to this appeal. The only monetary payment for preparation or submission of this brief will be by the Offices of Senators Byrd, Moynihan and Levin for its printing.

If the President signs a bill within the ten days (Sundays excepted) provided by the Constitution, the Act extends his domain over it for five more days (Sundays also excepted). 2 U.S.C. § 691(a). Within that extended time he may cancel "whole" amounts of two broad spending categories ("discretionary budget authority" and "new direct spending") and any "limited tax benefit." *Id.*

"Budget authority" is "authority provided by Federal law to incur financial obligations." *Id.* § 622(2)(A). "Discretionary" authority may be found in "any general or special appropriation Act, or any Act making supplemental, deficiency, or continuing appropriations." *Id.* § 691e(1). The President may item veto the "entire dollar amount of budget authority . . . specified in an appropriation law" or "required to be allocated by a specific proviso in an appropriation law for which a specific dollar figure was not included." *Id.* § 691e(7)(A)(i).

The President is not limited to the text of appropriations laws. To give him "increased discretion," H.R. Conf. Rep. No. 104-491 ("Conf. Rep.") at 32 (1996), he may cancel amounts "represented separately in any table, chart, or explanatory text included in the statement of managers or the governing committee report accompanying such law." 2 U.S.C. § 691e(7)(A)(ii). He may also "look through," Conf. Rep. at 33, an appropriation act to an authorization act that provides for the availability of funds, and cancel the amount stated there. 2 U.S.C. § 691e(7)(A)(iii).

"Direct spending" is "(A) budget authority provided by law (other than an appropriation law); (B) entitlement authority; and (C) the food stamp program." *Id.* § 691e(5). In addition to canceling payments to individuals and private entities, the President may void payments to state and local governments. Conf. Rep. at 36-37.

"New" direct spending means a "provision of law that is estimated to result in an increase in budget authority or outlays" in the current or future years. 2 U.S.C. § 691e(8). There need not be "a net increase" in spending. A new direct spending measure is subject to cancellation "whether or not it is offset by another provision that reduces direct spending or increases revenues in the same law." Conf. Rep. at 36. The President may base cancellations on the "interactions among provisions in a new law, other provisions in that same new law, and underlying law." *Id.*

A "limited tax benefit" includes any "Federal tax deduction, credit, exclusion, or preference to 100 or fewer beneficiaries" that is "revenue-losing" within five fiscal years. *Id.* §§ 691e(9)(A)(i) and (E). It also includes a provision which "provides temporary or permanent transitional relief for 10 or fewer beneficiaries in any fiscal year from a change" in the federal income tax code. *Id.* § 691e(9)(A)(ii).

The President must determine that cancellations will reduce the federal deficit, not impair essential federal government functions, and not harm the national interest. *Id.* § 691(a). But within these outer limits, the Act provides no standard for choosing among the thousands of items that may be canceled each year.

Spending and tax item vetoes "immediately" and "automatically," Conf. Rep. at 22, "take effect upon receipt" in the House and Senate of a message "notifying" Congress of the cancellation. 2 U.S.C. § 691b(a). A cancellation "is nullified only if a disapproval bill is enacted into law." Conf. Rep. at 22.

The power to "cancel" an appropriation is defined as the power to "rescind" it. 2 U.S.C. § 691e(4)(A). The power to "cancel" direct spending or limited tax benefits is defined as the power "to prevent" them "from having legal force or

effect." *Id.* § 691e(4)(B) and (C). It "renders the provision void, such that the obligation of the United States has no legal force or effect." Conf. Rep. at 22.

For contracts, cancellation "foreclose[s] the ability of the Federal Government to enter into an agreement." For entitlements or food stamps, it negates the government's "legal obligation to pay a benefit" or "eliminat[es] the increase in food stamp obligations that would otherwise occur." *Id.* at 29. For taxes, cancellation empowers the President "to collect the tax that would otherwise not be collected or to deny the credit that would otherwise be provided." *Id.*

The Act contains no severability clause. The Senate bill had been amended on the floor to provide (as part of a judicial review section) "that if any one provision of the Act is found to be unconstitutional, the remainder of the Act will be held harmless." Conf. Rep. 17. But the conferees without explanation deleted the clause. *Id.* at 41.

The Act has been exercised to strike 82 items from the principal spending and tax bills of a full budgetary cycle: three items from the annual reconciliation legislation enacted in 1997, divided into a spending law — the Balanced Budget Act of 1997, Pub. L. No. 105-33 (1 item), and a tax law — the Taxpayer Relief Act of 1997, Pub. L. No. 105-34 (2 items), and 79 items from nine of the thirteen regular annual appropriation laws enacted in 1997 for Fiscal Year 1998.[2]

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[2] *See* Statement of June E. O'Neill, Director, Congressional Budget Office, on *The Line Item Veto Act After One Year: Before the Subcomm. on Legislative and Budget Process of the House Comm. on Rules*, 105th Cong., 2d Sess. (Mar. 11, 1998).

SUMMARY OF ARGUMENT

The Line Item Veto Act grants the President a unilateral power to amend or repeal legislation. From the perspective of either the truncated versions of laws that are left after line item vetoes or the repeal of the provisions that are removed by them, the Act unconstitutionally alters the lawmaking system established by the Framers.

1. The Framers built on the principle, long settled in England, that the Executive should not alter legislation but be limited to approving or disapproving laws. They rejected proposals to grant the President an absolute final power to disapprove bills, and instead provided the Executive with a limited role in the legislative process. The requirement that the House and Senate, elected on different electoral principles, must agree before any new law is made or an existing one is changed or repealed, is an essential feature of the Framers' lawmaking system. The Constitution mandates the concurrence of both Houses to the final contents of spending and tax bills as well as all other legislation.

2. The Line Item Veto Act undermines central values and balances of the Constitution. The accommodation of differences is a vital task in a representative democracy. But the Act empowers the President to strike provisions essential to achieving compromise in the House and Senate and concurrence between them. The Constitution provides ground rules for revisiting compromises. They require that the two Houses agree in order to change the terms of a bargain between them. The Framers understood that the separation of powers in lawmaking would bear upon other balances between the legislative and executive branches. The Act also undermines the public's interest in faithful adherence to the separation of powers.

3. The fundamental question is whether the Act's item veto authority is "essentially legislative in purpose and effect." *INS v. Chadha*, 462 U.S. at 952. The Act places the President procedurally and substantively in the legislative process. His power is uniquely tied to the manner in which he exercises Article I authority. The "nature of the decision" made by the President "further manifests its legislative character." *Id.* at 954. In crafting Article I, the Framers enabled the President to veto entire bills because he disagrees with their policy. The Act unconstitutionally enlarges the President's Article I authority by also empowering him to item veto provisions of bills because he disagrees with Congress about their policy or mode of enactment, or for any other reason. The "legislative character" of the President's item veto power is also "confirmed by the character of the congressional action it supplants." *Id.* at 952. The actions supplanted are legislative measures that have been approved by both Houses and may be amended or repealed only by their bicameral action.

4. In their brief, appellants introduce an argument about the severability of item veto authority for taxes, but they did not present a question about it. There is strong evidence that coverage under the Act of a full spectrum of federal fiscal matters — appropriations, direct spending, and targeted tax benefits — was essential to the legislative bargain that made passage possible. In any event, the Constitution's "single, finely wrought" procedure for making laws, *INS v. Chadha*, 462 U.S. at 951, is indivisible and applies to legislation on all subjects.

ARGUMENT

The lawmaking system established by the Constitution operates on a simple principle. Both the Senate and House have to agree to every legislative measure or it cannot become law. Either House may "propose" amendments to any bill, but each needs to "concur" in the other's amendments before the bill may become law. *See* U.S. Const., Art. I, § 7, cl. 1. The President may "return" a bill to Congress for "reconsideration," *id.* cl. 2, but has no power to alter any bill.

The district court examined the Act from several perspectives and correctly concluded that its constitutionality failed each examination. The Act violates Article I because "laws that resulted after the President's line item veto were different from those consented to by both Houses of Congress." J.S. App. 24a; *see Raines v. Byrd*, 117 S. Ct. 2312, 2325 (1997) (Stevens, J.) (dissenting on standing) ("Act purports to establish a procedure for the creation of laws that are truncated versions of bills that have been passed by the Congress and presented to the President for signature"). The President's unilateral alteration of provisions of duly enacted laws also breaches the requirement, likewise grounded in Article I, that "[o]nce a bill becomes law, it can only be repealed or amended through another, independent legislative enactment." [3]

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[3] J.S. App. 25a. *See* 142 Cong. Rec. S2963 (daily ed. Mar. 27, 1996) (Sen. Levin):

> The problem with the current bill is that it fails the fundamental test of being consistent with the requirements of the Constitution that any repeal or amendment to a law be enacted in the same way that the law itself was enacted. The Constitution establishes the method by which laws are enacted, by which laws are amended, and by which laws are repealed. It is fundamental constitutional law.

From either perspective — that of the truncated versions of laws left after line item vetoes or the repeal of provisions taken out by them — the Act profoundly alters the lawmaking process established by the Constitution. It thus "impermissibly disrupts the balance of powers among the three branches of government." J.S. App. 27a. These conclusions are well-grounded in both the history and underlying principles of the Constitution's bicameralism and presentment requirements.

I. THE FRAMERS' LAWMAKING SYSTEM HAS TWO CENTRAL FEATURES: A LIMITED VETO POWER FOR THE PRESIDENT AND A UNIVERSAL REQUIREMENT OF BICAMERALISM

The Framers were students of history. They built on knowledge that in England "the share of legislation, which the constitution has placed in the crown, consists in the power of *rejecting*, rather than *resolving*." 1 W. Blackstone, *Commentaries on the Laws of England* 154. In that role, "The crown cannot begin of itself any alterations in the present established law; but it may approve or disapprove of the alterations suggested and consented to by the two houses." [4]

[4] *Id.* The early 15th century origin of the requirement that "the king shall have nothing to do save to assent or dissent" to laws is described in F.W. Maitland, *The Constitutional History of England* 189 (1908) (reprinted 1993). After repeatedly protesting unilateral changes by the king of laws requested by it, in 1414 commons prayed and Henry V agreed that there be "no law made and engrossed as statute and law neither by additions or diminutions by no manner of term or terms the which should change the sentence and intent asked." *Id.*; *see also* C.E. Stevens, *Sources of the Constitution of the United States* 94-95 (1894) (U.S. Constitution "perpetuates this usage . . . by limiting the executive to simple veto or approval").

The Framers also remembered abuses of royal prerogatives. In explaining the resolve to separate from England, the Declaration of Independence sets forth the "history of repeated injuries and usurpations, all having in direct object the establishment of an absolute Tyranny over these States." The first grievance listed was that the king "has refused his Assent to Laws, the most wholesome and necessary for the public good."

Against that background, the Constitutional Convention turned early in its proceedings to the task of creating "a single, finely wrought and exhaustively considered, procedure," *INS v. Chadha*, 462 U.S. at 951, for making laws. Beginning with Edmund Randolph's plan for organizing the new government, the Convention considered the two issues that are at the heart of this case: the relationship between Congress and the President in lawmaking — the veto power, and the relationship between the two Houses of Congress in that process — bicameralism.

A. The Veto Power

On May 29, Randolph proposed that "the National Legislature ought to consist of two branches," 1 *The Records of the Federal Convention of 1787* 20 (M. Farrand rev. ed. 1966)("Farrand"), and that "a National Executive be instituted." *Id.* at 21. With respect to lawmaking, he proposed that "the Executive and a convenient number of the National Judiciary, ought to compose a council of revision with authority to examine every act of the National Legislature before it shall operate." Upon its examination of the act, the "dissent" of the Council "shall amount to a rejection" of it. But the Council would not have the last word. Its rejection would not stand if "the Act of the National Legislature be again passed,. . . by [ ] of the members of each branch," the requisite fraction to be supplied. *Id.*

The Convention took up the resolution on June 4. After discussing whether to join Judges with the Executive in a Council of Revision[5] — an idea they ultimately rejected — the Framers focused on the Executive's power to "negative" Acts of Congress.

James Wilson and Alexander Hamilton moved "to give the Executive an absolute negative on the laws." *Id.* at 98. Benjamin Franklin objected. With reference to Pennsylvania, he related:

> The negative of the Governor was constantly made use of to extort money. No good law whatever could be passed without a private bargain with him. An increase of his salary, or some donation, was always made a condition; till at last it became the regular practice, to have orders in his favor on the Treasury, presented along with the bills to be signed, so that he might actually receive the former before he should sign the latter.

Id. at 99. If the Convention accepted the absolute negative proposed by Wilson and Hamilton, Franklin feared that the result would put "the Legislature into a compleat subjection to the will of the Executive."[6]

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[5] *Id.* at 97-98. In considering the Presentment Clause, the Framers made repeated use of the word "revision": *e.g.*, "Council of Revision," or the proposal to present bills to the President "for his revision." 2 Farrand 181. The accepted definition of "revision" at the time of the framing was "review." 2 S. Johnson, *A Dictionary of the English Language* (6th ed. 1785); *see Nixon v. United States*, 506 U.S. 224, 229-30 (1993) (use of Johnson's Dictionary).

[6] *Id.* Colonel Mason seconded Franklin's observations on the "probable abuses of a negative." 1 Farrand 101. Drawing on "experience, the best of all tests," Mason warned in language relevant to the shift of power here:

Roger Sherman concurred, being "agst. enabling any one man to stop the will of the whole." "[W]e ought," he said, "avail ourselves of his wisdom in revising the laws, but not permit him to overrule the decided and cool opinions of the Legislature." *Id.*

The key, Madison suggested, was the "proper proportion" of each branch of the Legislature that "should be required to overrule the objections of the Executive." *Id.* At day's end, the Convention rejected the idea of an absolute veto and voted to enable "*two thirds* of each branch of the Legislature to overrule the revisionary check." *Id.* at 104.

The Convention revisited several times the issue of the Executive's role in lawmaking, but its final product adhered to the basic framework established on June 4. At one point, in August, the Convention increased to 3/4 the vote in each House required to override the President's negative. 2 Farrand 301. But the Convention returned to the lower 2/3 requirement in September. *Id.* at 587. Hugh Williamson, who had moved in August to increase the required override vote, told the Convention that the higher vote "puts too much in the power of the President." *Id.* at 585.

While the basic design ultimately remained intact, the Convention added considerable detail to what became Article I, section 7, clause 2. Regarding the specific steps prescribed in the Presentment Clause, little if anything was left to imagination.

The steps are precise. Every bill must first "have passed the House of Representatives and the Senate." "[B]efore it

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> The Executive may refuse its assent to necessary measures till new appointments shall be referred to him; and having by degrees engrossed all these into his own hands, the American Executive, like the British, will by bribery & influence, save himself the trouble & odium of exerting his negative afterwards.

become a Law," each bill must "be presented to the President." The President's choices are exactly stated: "If he approve he shall sign it, but if not he shall return it." The manner of return is prescribed: the bill is to be accompanied by "his Objections," it is to go "to that House in which it shall have originated," and that House "shall enter the Objections at large on their Journal." [7] Time is counted exactly: the President is to act within ten days (Sundays excepted). A two-thirds vote in each House is required to override a veto; votes on override must be recorded. To avoid ambiguities by which the strictures of the Presentment Clause might be "evaded," 2 Farrand 304-305, the Framers added a second clause to assure that these steps applied to "Every Order, Resolution, or Vote" in which the Senate and House must concur. U.S. Const., Art. I, § 7, cl. 3.

Within the limited legislative role prescribed for him by the Constitution, part of the President's power is that his reasons for proposing or acting on a bill are not circumscribed. At the front end, he may recommend to Congress such measures "as he shall judge necessary and expedient." U.S. Const., Art. II, § 3. At the back end, he may, in Madison's words, return bills in order "to restrain the Legislature from encroaching on the other co-ordinate Departments, or on the rights of the people at large; or from passing laws unwise in their principle, or incorrect in their form." 1 Farrand 139. In short, he may veto a bill simply

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[7] In providing for a permanent record of the President's objections, the Framers understood it might take time to see wisdom in those objections. "[T]he objections of the president," James Wilson observed in lectures on the Constitution, "even when unsuccessful, will not be without their use." If "experience shows the law to be replete with all the inconveniences, which sagacious scrutiny foresaw in its operations, the disease will no sooner appear, than the remedy will be known and applied." 1 *The Works of James Wilson* 406 (Andrews ed. 1896).

because he disagrees with it. But while he possesses this broad power "before" a bill becomes a law, once it is law his duty is to "take Care that [it] be faithfully executed." U.S. Const., Art. II, § 3.

B. Bicameralism

A second feature of the Framers' lawmaking system is the core principle that two Houses of Congress based on "different modes of election, and different principles of action," The Federalist No. 51, p. 350 (J. Cooke ed. 1961) (Madison), must agree before any new law is made or an existing one is amended or repealed.

The Framers reached early consensus that the House should be "elected by the people." But they struggled over two points. One was the representation of large and small states in the Senate. The other was the allocation between the two chambers of legislative authority over the power to spend and tax. In writing a Constitution in which "the legislative department alone has access to the pockets of the people," The Federalist No. 48, p. 334 (Madison), the Framers had to determine how to assign authority within a bicameral Congress over these pivotal matters.

There can be no doubt about the importance to the Framers' design of the powers to spend and tax. Balancing the Executive's hold on "the sword of the community," the Legislature "commands the purse." The Federalist No. 78, pp. 522-23 (Hamilton). To Madison, the power of the purse was "the most compleat and effectual weapon with which any constitution can arm the immediate representatives of the people, for obtaining a redress of every grievance, and for carrying into effect every just and salutary measure." The Federalist No. 58, p. 394. And in a federal nation, "the power of taxation" was "the most important of the authorities

proposed to be conferred upon the Union." The Federalist No. 33, p. 205 (Hamilton).

The committee charged with considering competing plans reported to the Convention on July 5. It recommended that the House be apportioned on the basis of population, a benefit to larger states, and that each state have an equal vote in the Senate, an accommodation to smaller states. On allocating authority between the Houses, it recommended "that all bills for raising or appropriating money . . . shall originate in the 1st branch of the Legislature, and shall not be altered or amended by the 2d branch." 1 Farrand 526. This would have limited the Senate's role to approving or disapproving (but not shaping through amendments) money bills originating in the House.

The Convention accepted the committee recommendation to apportion the House on the basis of population. It also accepted as a central principle of the Constitution the idea of equality of the states in the Senate. But the Framers modified the committee recommendation about the two legislative powers that were absolutely critical to the compromise: the power to spend and the power to tax. These, of course, are the very powers involved in the Line Item Veto Act. Limiting to "Bills for raising Revenue" the exclusive power of the House over origination, the Convention agreed that even as to them "the Senate may propose or concur with Amendments as on other Bills." U.S. Const., Art. I, § 7, cl. 1.

This cemented (save for origination of revenue bills) "the equal authority" of the two Houses in the lawmaking process. The Federalist No. 58, p. 393 (Madison). Not only is the "concurrence of separate and dissimilar bodies required in every public act," The Federalist No. 63, p. 427 (Madison), but each House through the amending process has an equal opportunity to shape every law, subject to the concurrence of the other House.

II. THE ACT UNDERMINES CENTRAL VALUES AND BALANCES OF THE CONSTITUTION

A. Compromise and Accommodation Within the Legislative Branch

The bicameral system crafted by the Framers establishes a measured lawmaking process that requires three separate legislative concurrences before a bill may become a law. The House must agree within itself, and the Senate must do the same. Then the two Houses must agree with each other. Under the Great Compromise, Madison explained, "No law or resolution can now be passed without the concurrence first of a majority of the people, and then of a majority of the states." The Federalist No. 62, p. 417.[8]

But under the Line Item Veto Act, the President may strike provisions instrumental to obtaining majorities in either Chamber. Or he may keep provisions critical to passage in the House, while excising amendments that were equally critical to Senate passage, or vice versa. The final product no longer need be the one that attained "the concurrence" of the people and the States as the Framers had required.

In "produc[ing] laws in violation of the requirement of bicameral passage," J.S. App. 27a, the Act undermines the genius of the Constitution's lawmaking system. Clashes of interest are an inevitable part of representative democracy in a continental nation whose "so many separate descriptions of citizens" embrace, as Madison observed (The Federalist No. 51, pp. 351, 353), a "great variety of interests, parties and

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[8] When the Committee of Detail proposed that each House "have a negative on the other," Madison moved (and the Convention agreed) to strike the phrase as superfluous, "the idea being sufficiently expressed" in the vesting of legislative power in two distinct bodies, the Senate and House. 2 Farrand 197.

sects." The Framers anticipated and respected clashes of interest, while providing for accommodation through "a process of discussion and compromise." J.S. App. 24a.

Applying a new "science of politics," The Federalist No. 9, p. 51 (Hamilton), the Framers not only accepted "human nature," *id.*, No. 51, p. 349 (Madison), but enlisted it to help bring about an enduring republic. There would be conflicts. "Ambition must be made to counteract ambition," Madison wrote. Thus, the Constitution is organized around devices that offset "by opposite and rival interests, the defect of better motives." *Id.* Throughout our history Members have supported measures to achieve progress in other regions "for the common benefit." [9] But the Framers also expected Members would often be "partizans of their respective States." The Federalist No. 46, p. 318 (Madison).

To produce a workable government given the fierce contention of "opposite and rival interests," the Framers understood the necessity for "compromise of as many dissimilar interests and inclinations." The Federalist No. 85, p. 591. "The result of the deliberations of all collective bodies," Hamilton observed, "must necessarily be a compound as well of the errors and prejudices, as of the good sense and wisdom of the individuals of whom they are composed." [10]

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[9] D. Webster, *Second Reply to Hayne* (Jan. 26 & 27, 1830), *as reprinted in* 3 R. Byrd, *The Senate 1789-1989* 37, 48 (1994).

[10] *Id.* In that same spirit, Franklin, at a moment when the Convention was seriously divided and its future uncertain, spoke memorably of the need to compromise:

> When a broad table is to be made, and the edges (of planks do not fit) the artist takes a little from both, and makes a good joint. In like manner here both sides must part with some of their demands, in order that they may join in some accommodating proposition.

1 Farrand 488.

This can be seen almost every day that the Congress is in session. Opposite and rival interests accommodate one another. Coalitions form, and slowly a majority is attained. Whether the task is balancing development in different regions in the 1820's,[11] or reducing the deficit in the 1990's,[12] to legislate for a diverse, federal nation "Compromise and trade-offs are the key." *Id.*

The ability to compromise may turn on a single vote in either House. The Framers knew, for example, that the Senate might be "equally divided," and provided for the Vice President's deciding vote as President of the Senate. U.S. Const., Art. I, § 3, cl. 4. A bare majority of Senators (or fifty plus the Vice President) might join to pass a complex bill in which there is a provision critical to each. Absent that provision a Senator might have voted "nay," and the bill would have failed. Under the Line Item Veto Act, the President can strike that very provision and create a truncated version of a law which would not have passed the Congress.

The Constitution provides ground rules for revisiting compromises. The Presentment Clause enables the President to call for "reconsideration" by the Senate and House. Either body can decide that the changes which the President requests are unacceptable, and that no law should be enacted. But if they wish to override, they need to agree. If they wish to

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[11] D. Webster, *Second Reply to Hayne*, *supra* note 9, at 48.

[12] 141 Cong. Rec. S4444 (daily ed. Mar. 23, 1995) (Sen. Moynihan):

> In 1993, I was chairman of the Senate Finance Committee. The task of raising taxes by a quarter of a trillion dollars, and the lion's share of an equal amount in spending cuts, thus fell to our committee[ ] and to its chairman.
>
> How did we do it? We did it the way the Framers of the American Constitution envisioned. We made accommodations that made up for the defect of better motives.

modify a bill to accommodate the President's objections, the two Houses have to agree on a new text and present it to the President before it may become law. Or, if they wish to reconsider an existing law — by amending or repealing it, the House or Senate has to persuade the other to join in enacting a new one. Neither acting alone can change the terms of a bargain between them.

Under the Line Item Veto Act, the compromises within and between each House that make concurrence to legislation possible are subject to unilateral change by the President. The result will be an erosion of "that spirit of trust, which performance reinforces and creates the stability of our institutions." 142 Cong. Rec. S2974 (daily ed. Mar. 27, 1996) (Sen. Moynihan).

B. The Relationship Between the Political Branches

In addition to diminishing the ability of the legislative branch to reach the accommodations and compromises essential to its responsibilities under the Constitution, the Act threatens to disrupt significantly other balances struck by the Framers. This can be seen in relation to the veto itself, as well as other critical interactions between the political branches.

As designed by the Framers, the veto is a potent power. Its strength is demonstrated by experience. From President Washington's first veto to President Clinton's veto last November of the disapproval of military construction cancellations, Presidents have returned 1,468 bills to Congress. Only 106, or 7%, of these return vetoes have been overridden.[13] Moreover, the Framers contemplated that Congress would "often be restrained by the bare apprehension

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[13] *See Presidential Vetoes, 1789-1996*, S. Pub. 105-22, at ix (1997) (1,465 plus three vetoes last year).

of opposition" by the President. "A power of this nature, in the executive," Hamilton explained, "will often have a silent and unperceived though forcible operation." The Federalist No. 73, p. 498.

But the Constitution's design, the requirement that the veto power applies to entire bills, also tempers that power. Informed by having presided at the Constitutional Convention, Washington understood the President's unavoidable constitutional choice: to accept the bad (in the President's eyes) with the good, or reject the good with the bad. In a 1793 letter to Edmund Pendleton, he wrote:

> You do me no more than Justice when you suppose that from motives of respect to the Legislature (and I might add from my interpretation of the Constitution) I give my Signature to many Bills with which my Judgment is at variance. . . . From the nature of the Constitution, I must approve all the parts of a Bill, or reject it in toto. To do the latter can only be Justified upon the clear and obvious ground of propriety; . . .

33 *The Writings of George Washington* 94, 96 (1940).

The Line Item Veto Act frees Presidents from the hard choice that the Constitution requires them to make. Presidents no longer need weigh the good and the bad. Instead a President can take what he wants and, supplanting Congress, become "a super legislator" who unilaterally "'fix[es]' legislation with which he does not fully agree by canceling only portions of the bill." 142 Cong. Rec. S2944 (daily ed. Mar. 27, 1996) (Sen. Byrd).

There is danger to the presidency in this. The Constitution offers only two choices to a President when presented with bills to which "[his] Judgment is at variance." The President may look at it from Washington's vantage

point, assess whether overall a veto is "Justified upon the clear and obvious ground of propriety," and if a veto does not meet that test then allow the bill to become law (either with or without his signature) "from motives of respect to the Legislature."

Or, if the bill fails that restrained test, the President can take a second constitutional course that rejects the bill but demonstrates a willingness to work with his coordinate branch. This is the path of returning the bill with his objections. That course permits the President, together with Congress, "through consensus and compromise and negotiations between the two branches, [to] develop a new and better total product which he could then sign." 142 Cong. Rec. S2944 (daily ed. Mar. 27, 1996) (Sen. Byrd).

These constitutional courses keep in good repair the fabric that allows separate political branches to work in mutual respect to "integrate the dispersed powers into a workable government." *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 635 (1952) (Jackson, J., concurring). The different course taken by the Line Item Veto Act — the unilateral imposition of statutory changes by the President right after his own act of approval makes it his duty to "faithfully" execute the bill that he had just signed — will inevitably damage that fabric.

Further, the Act's harm to the separation of powers goes beyond particular measures that a President might alter. The Act hands the President a powerful tool, beyond any power contemplated by the Framers, to use potential item vetoes to exact support from Members for other legislative measures or for the confirmation of nominees, or to cause them to refrain from oversight or candid criticism of the Executive through investigation or speech.

This is not late 20th century speculation. It is exactly what the worldly-wise delegates to the Constitutional Convention sought to avoid. Franklin, as noted earlier, described to the Convention how the Governor of Pennsylvania had used an absolute veto to cause the Legislature to strike "private bargain[s]" with him. 1 Farrand 99. Concerned that Presidents would use their absolute veto over bills to wrest favorable action from Congress on appointments, Mason seconded those observations: "The probable abuses of a negative had been well explained by Dr F as proved by experience, the best of all tests." [14]

C. The Relationship Between the Political Branches and the People

This Court has repeatedly held that the separation of powers is not merely an intramural interest of the branches of government. Abridgement of the separation of powers threatens harm to all whose "liberty and security" are its "ultimate purpose." *Metropolitan Washington Airports Authority v. Citizens for the Abatement of Aircraft Noise, Inc.*, 501 U.S. 252, 272 (1991); *see also United States v. Munoz-Flores*, 495 U.S. 385, 395 (1990) (allocation of lawmaking authority under Art. I, § 7, cl.1 of the Constitution "safeguard[s] liberty").

The public has a further stake in faithful adherence to the separation of powers in lawmaking: "effective and accountable" government. *Loving v. United States*, 517 U.S. 748, 757 (1996). Effectiveness is promoted because Article I's requirements of representation and bicameralism make

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[14] *Id.* at 101. Former President Taft objected to granting Presidents an item veto, finding "in such a powerful instrument like this, a temptation to its sinister use by a President eager for continued political success." W.H. Taft, *Our Chief Magistrate and His Powers* 27 (1916) (reprinted 1925).

Congress "the branch most capable of responsive and deliberative lawmaking." Public accountability is aided because the "clear assignment of power to a branch, furthermore, allows the citizen to know who may be called to answer for making, or not making, those delicate and necessary decisions essential to governance." *Id.* at 757-58.

The Act fails on these counts. Liberty and security are threatened whenever any public authority (here, a President through the item veto) can single out a few interests for adverse treatment. Accountability is diminished when, as occurs under the Act, responsibility for the final content of legislation is blurred.[15]

III. THE ACT UNCONSTITUTIONALLY GRANTS LEGISLATIVE POWER TO THE PRESIDENT

Defenders of the Act argue that it presents no issue about enlargement of the President's limited legislative role under Article I. This is so, they say, because his signature on a spending or tax bill carries him to the safe harbor of execution of the laws under Article II. The fundamental question, however, is not the "form" of the President's authority under the Act, but whether it is "essentially legislative in purpose and effect." *INS v. Chadha*, 462 U.S. at 952. Examined in that light, the Act places the President foursquare — procedurally, substantively, and unconstitutionally — in the legislative process.

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[15] *See* Brief Amicus Curiae for Congressman Dan Burton, at 15-16 ("there is no evidence that either of the provisions at issue in this case would have been approved by Congress in the absence of the Line Item Veto Act").

A. The President's Authority is Uniquely Tied to the Manner in Which He Exercises His Limited Power Under the Presentment Clause

The President's item veto power is dependent on his selecting one, and only one, of the choices that the Presentment Clause makes available to him in his limited legislative role under Article I. *See Bogan v. Scott-Harris*, No. 96-1569, slip op. at 10 (U.S. Mar. 3, 1998) (signing bill is "integral step[ ] in the legislative process"). The President gains item veto authority if he "signs" a bill. Item veto authority is not available if the bill becomes a law in any other way. Never before has Congress made presidential authority depend on the manner in which a bill becomes a law.[16]

If the intention of Congress was simply to give the President discretion in executing a spending or tax law, it would make no difference how that measure became law. But the Act is designed to "discourage [the President] from using his existing constitutional veto powers to veto an entire bill," 142 Cong. Rec. S2944 (daily ed. Mar. 27, 1996) (Sen. Byrd), by rewarding him with new item veto authority only if he signs a bill. By foregoing a constitutional veto, the President gets to use a newly minted statutory one. The Act is uniquely and inextricably embedded in the procedures of Article I.

B. The Power Ceded to the President — To Reject Provisions of Bills Solely Because of Disagreement with Them — is Legislative in Nature

After being launched by the way he uses his Article I presentment power, the "nature of the decision" implemented by the President "further manifests its legislative character." *INS v. Chadha*, 462 U.S. at 954.

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[16] *See* Rappaport, *Veto Burdens and the Line Item Veto Act*, 91 Nw. U. L. Rev. 771 (1997) (unconstitutionality of "signing" requirement).

The President is given a "maximum" (Conf. Rep. at 22) of five days to exercise his authority under the Act. This brief time allows Administration officials to search congressional committee reports to find appropriations items to line out,[17] and assemble "supporting material" (Conf. Rep. at 22) for a message to Congress. There is no intention that the President gain any executive experience in administering a spending or tax law before disassembling it. Indeed, the Act effectively precludes the President from gaining any such experience.

This is not a circumstance where the President "has the better opportunity of knowing the conditions which prevail in foreign countries," or to employ "confidential sources of information." *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 320 (1936). Nor is it a circumstance — because the Constitution "does not demand the impossible or the impracticable" — where Congress need not "find for itself every fact upon which it desires to base legislative action." *Yakus v. United States*, 321 U.S. 414, 424 (1944). Each of the detailed provisions lined out in this appeal is one for which Congress had found all the facts it needed for legislative action.

Instead, the free ranging grant to the President of authority to cancel items before learning anything from even trying to "take Care that [they] be faithfully executed" lays bare the Act's purpose. The Act effectively empowers the

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[17] Most of the appropriation item vetoes for this fiscal year were of amounts "represented separately" in conference reports, 2 U.S.C. § 691e(7)(ii), rather than specific amounts enacted in statutory text. To cancel them, Administration officials had to reach into explanatory text that was neither voted on by Congress nor presented to the President. *See Thompson v. Thompson*, 484 U.S. 174, 191-92 (1988) (Scalia, J., concurring) ("Committee reports . . . are frail substitutes for bicameral vote upon the text of a law and its presentment to the President.")

President to choose items to veto, from among the thousands of items cancelable annually in spending and tax bills, solely because of his disagreement with Congress about them.

The power to veto "improper" or "bad laws" that had been passed "through haste, inadvertence, or design," The Federalist No. 73, p. 495 (Hamilton), is, of course, one reason why the Framers provided the President in Article I with a conditional power to veto whole bills. The Line Item Veto Act, faithful at least to its name, enlarges the President's limited lawmaking role under Article I by also vesting him with the power to strike individual provisions he deems "improper" for any reason.

The power granted by the Act to "negate" the policy choices of Congress based simply on "disagreement" with them cannot be sustained under the non-delegation doctrine.[18] "That Congress cannot delegate legislative power to the President," this Court has long held, "is a principle universally recognized as vital to the integrity and maintenance of the system of government ordained by the Constitution." *Field v. Clark*, 143 U.S. 649, 692 (1892).

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[18] Lessig, *Lessons from a Line Item Veto Law*, 47 Case W. Res. L. Rev. 1659, 1663 (1997):

> [A]mong the legitimate intervening events that might justify a President's altering Congress's policy choice, disagreement is not one. The statute enhances the efficiency of the President's contrary policy will. This the constitution cannot allow. This is a statute designed simply to increase presidential control over the legislative process. Like the attempt to increase congressional control over the legislative process [*See INS v. Chadha*, 462 U.S. 919 (1983)], it should be unconstitutional.

Id. *Chadha*, as this Court noted, involved the question whether "disagreement" by the Congress with the Attorney General involved "determinations of policy" that can be implemented "in only one way: bicameral passage followed by presentment to the President." 462 U.S. at 954-55.

The delegation in the tariff act at issue in *Field* was permissible, in part, because "Nothing involving the *expediency* or the *just operation* of such legislation was left to the determination of the President." [19] But that is exactly the fundamental line that the Act crosses by empowering the President to strike out provisions that he deems inexpedient.

A sampling of the President's reasons for striking provisions of spending or tax bills illustrates the legislative nature of the power ceded by the Act. For example, he canceled items because they were "not requested in the President's FY 1998 Budget." *E.g.*, 62 Fed. Reg. 52452-69 (Oct. 7, 1997); *id.*, 54338 (Oct. 17, 1997). Article II, section 3 provides that the President shall "recommend" measures to the Congress, a power that enables him "to point out the evil, and to suggest the remedy." 3 J. Story, *Commentaries on the Constitution* § 1555, p. 413 (1833). Or under Article I, section 7 the President may "return" a bill with the "objection" that it contains matters he had not requested. But it is unimaginable that under Article II a President could say (or be authorized by Congress to say), "I will only execute laws which I request." [20]

---

[19] *Id.* at 693 (emphasis added); see *J.W. Hampton, Jr. & Co. v. United States*, 276 U.S. 394, 410 (1928) (describing Court's holding in *Field*). The Framers used the term "expedient" to describe the President's duty to *recommend* to Congress any legislation that for any reason he deems wise to enact. U.S. Const., Art. II, § 3.

[20] Justice Story explained that in "ancient free states, the share of the people in the business of legislation was to approve or reject the propositions, which were made to them." The "necessary tendency" of that power "is, ultimately to concentrate all power in the *initiative* body, and to leave to the approving body but the shadow of authority." It would be "the surest means" of "overthrowing the public liberties, by corrupting the very fountains of legislation." 2 *id.* § 890, pp. 355-56.

The President has canceled an item because "it was not the subject of extensive deliberation and debate prior to enactment." 62 Fed. Reg. 54338 (Oct. 17, 1997). Of course, the President may "return" a bill with an "objection" to congressional "haste," The Federalist No. 73, p. 495, in enacting it. But it is unthinkable that under Article II a President could say (or be authorized by Congress to say), "I will not execute this law because Congress passed it with insufficient debate."

And the President has canceled items, including those in this appeal, because he disagreed with their policy, drafting, or implications for future legislative action. He struck the Medicaid item in *Clinton v. City of New York* because it gave "preferential treatment to only one State," and would be "a costly precedent for other States to request comparable treatment." 62 Fed. Reg. 43263. He lined out the tax item in *Rubin v. Snake River Potato Growers* because it "would not have benefitted farmers generally," among other reasons. *Id.*, 43267. These are the very kind of policy objections for which the President's veto power under Article I, section 7 is used. But the Constitution certainly does not permit a President to say under Article II (or be authorized by Congress to say), "I will not execute this law because I disagree with it."

C. The Legislative Character of the Line Item Veto is Further Revealed by What It Supplants: Measures Passed by Congress that Only Congress May Amend or Repeal

Finally, the "legislative character" of the President's line item authority is "confirmed by the character of the congressional action it supplants." *INS v. Chadha*, 462 U.S. at 952. The "congressional action" here is bicameral agreement that had become law, albeit briefly, with the President's signature. It is "supplanted" because, once the

President strikes an item, the measure that it was part of is effectively amended and the provision that is stricken is effectively repealed. Stricken direct spending or tax provisions no longer have "legal force or effect." Appropriations are "rescinded." As the district court held, the Act "authorizes the President to permanently extinguish laws." J.S. App. 30a. But as this Court has made plain, "Amendment and repeal of statutes, no less than enactment, must conform with Art. I." *INS v. Chadha*, 462 U.S. at 954.

Just as the President cannot take back a bill he has returned with objections under Article I, section 7, he cannot take back a line item veto, even if he quickly learns he was flatly mistaken. To illustrate, within days of the President's item veto of budget authority in the Military Construction Appropriations Act, the Administration realized that a number of cancellations were "a result of inaccuracies in the data provided by the Department of Defense." *See* 143 Cong. Rec. S11183 (daily ed. Oct. 24, 1997) (letter from OMB Director). But nothing could be done except to pass a new law because the item veto eliminated budget authority for those projects.

IV. THE CONSTITUTION'S "SINGLE, FINELY WROUGHT" LAWMAKING PROCESS IS INDIVISIBLE

Appellants did not present to this Court a question about severability. Nevertheless, they assert that "[e]ven if the Act's provisions regarding limited tax benefits were found to be constitutionally deficient, that result would not affect the validity of the rest of the Act." Brief for Appellants, at 48 n. 28.

The Act does not contain a severability clause. A severability clause had been added to the Senate bill by floor amendment, 141 Cong. Rec. S4259 (daily ed. Mar. 21,

1995), but was dropped in conference, Conf. Rep. 17, 41, albeit without explanation.

There is substantial evidence that inclusion of measures to address a range of components of the deficit problem — appropriations, direct spending and targeted tax benefits — was essential to the bargain that made passage possible. Senator Stevens, the chairman of the Committee on Appropriations and a manager at the conference on the bill, explained how he moved from being an opponent to a supporter. He "opposed this bill in the past because it did not cover the largest culprits of wasteful spending: entitlements and tax breaks for special interests." "At my request," he told the Senate, "the bill has been expanded and broadened to cover not only appropriations for specific projects but tax breaks and entitlements as well." He now supported the bill because it included "the core concept" that he had "insisted" on. 142 Cong. Rec. S2955 (daily ed. Mar. 27, 1996).

There is no occasion, however, to reach a statutory severability question. The overriding point is that the "single, finely wrought" constitutional procedure for making laws, *INS v. Chadha*, 462 U.S. at 951, is indivisible. Other than requiring that revenue bills originate in the House, the Constitution's lawmaking system is the same for legislation on all subjects.

In *Chadha*, Justice Powell, concurring in the judgment, would have invalidated the legislative veto only as applied to the adjudication of an individual's rights without reaching "the broader question whether legislative vetoes are invalid under the Presentment Clauses." *Id.* at 967. But the Court understood that the question was whether the one-House veto was "legislative in purpose and effect and subject to the procedures set out in Art. I." *Id.* at 957 n.22. Once the Court identified the question as such, its reasoning had the

inevitable effect of sweeping away all legislative vetoes. *Id.* at 967 (White, J., dissenting).

The natural consequence of a comparable ruling invalidating the line item veto as a violation of the Constitution's "single" lawmaking system would be the same for all line item vetoes, just as the ruling in *Chadha* was for all legislative vetoes, no matter what their subject might be.

CONCLUSION

The Court should affirm the judgment of the district court.

Respectfully submitted,

MICHAEL DAVIDSON
Counsel of Record
3753 McKinley Street, N.W.
Washington, D.C. 20015
(202) 362-4885

Of Counsel:
LINDA GUSTITUS
MARK A. PATTERSON

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In The

Supreme Court of the United States

October Term, 1997

WILLIAM J. CLINTON, et al.,

Appellants,

v.

CITY OF NEW YORK, et al.,

Appellees.

ROBERT E. RUBIN,

Appellant,

v.

SNAKE RIVER POTATO GROWERS, INC., et al.,

Appellees.

On Appeal From The United States District Court
For The District Of Columbia

BRIEF *AMICUS CURIAE* OF MARCI HAMILTON AND DAVID SCHOENBROD IN SUPPORT OF APPELLEES

*MARCI A. HAMILTON
Benjamin N. Cardozo
School of Law
55 Fifth Avenue
New York, New York 10003
(212) 790-0215
(212) 790-0205 (facsimile)

DAVID SCHOENBROD
New York Law School
57 Worth Street
New York, New York 10013
(212) 431-2339
(212) 431-9205 (facsimile)

**Counsel of Record*

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QUESTION PRESENTED

Whether the Line Item Veto Act violates Article I of the Constitution by delegating legislative lawmaking authority to the President?

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PERMISSION TO FILE BRIEF AS *AMICI CURIAE*

Marci Hamilton and David Schoenbrod file this brief as *amici curiae* in support of Appellees, pursuant to Sup. Ct. R. 37.2. A letter of the Appellants, dated March 30, 1998, and letters of the Appellees, dated March 30, 1998 and March 30, 1998, by which counsel for the parties evidenced their consent to the filing of this *amicus curiae* brief, have been filed with this Court.

INTERESTS OF *AMICI CURIAE*

Professors Marci Hamilton and David Schoenbrod are law professors who specialize in constitutional and policy perspectives on legislative delegation. They are submitting this brief out of concern that the district court's reasoning unnecessarily complicates this Court's nondelegation doctrine. They are also concerned that this Court's nondelegation doctrine, though adequate to analyze and invalidate the Line Item Veto Act, has lost sight of its constitutional moorings.[1]

SUMMARY OF ARGUMENT

The Line Item Veto Act is a new approach in Congress's now habitual inclination to evade its lawmaking responsibilities by handing those responsibilities to the

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[1] Pursuant to Sup. Ct. R. 37.6, *amici curiae* disclose that they authored this brief in whole. No monetary contribution for the preparation or submission of this brief was made by any entity other than *amici curiae*.

Executive. Unlike earlier attempts to delegate, where Congress gave its lawmaking authority to the Executive so that the Executive would fulfill Congress's identified policy objectives, this Act gives the President authority unilaterally to *negate* Congress's chosen objectives. This new form in the evolution of congressional delegation plainly violates this Court's existing nondelegation doctrine. This case is an instance in which the Court's oft-criticized nondelegation doctrine can be employed consistently and coherently with its major constitutional premise that Congress holds sole responsibility to make the law.

The Framers crafted Article I to vest lawmaking power exclusively in Congress, and the early Supreme Court interpreted Article I to prevent Congress from delegating its lawmaking power to other branches. This Court believed correctly that establishing limits on Congress's ability to evade its responsibility to make the law was essential to democracy and liberty. After more than a century of adherence to the Framers' original intent, this Court constructed a new approach to delegation based on false empirical assumptions that has allowed Congress to evade democratic accountability and to weaken the protections of liberty inherent in Article I. This history is detailed in Parts II.A and B. Parts II.C and II.D of this brief argue that the time has come for this Court to return to the Framers' and this Court's original understanding and application of the nondelegation doctrine.

Whether this Court embraces its existing nondelegation doctrine or begins to craft a doctrine truer to its

constitutional origins, the Line Item Veto Act is unconstitutional.

ARGUMENT

I. THE LINE ITEM VETO ACT IS UNCONSTITUTIONAL UNDER THIS COURT'S NONDELEGATION DOCTRINE

Straightforward application of this Court's nondelegation doctrine makes clear that the Line Item Veto Act is unconstitutional. The district court's reasoning unnecessarily complicates the matter while the Government's defenses are unpersuasive.

A. The Line Item Veto Act Is Unconstitutional Under This Court's Settled Doctrine

Under this Court's existing doctrine, the Line Item Veto Act is an unconstitutional delegation of legislative lawmaking power.

This Court's nondelegation doctrine requires, at a minimum, that Congress identify its objective and that it provide guidance on how to achieve that objective if it delegates administration of the law to the Executive. *See, e.g., Loving v. United States*, 116 S. Ct. 1737, 1750 (1996); *Mistretta v. United States*, 488 U.S. 361, 371-73 (1988); *Yakus v. United States*, 321 U.S. 414, 426 (1944); *NBC v. United States*, 319 U.S. 190, 216-17 (1943); *New York Cent. Sec. Corp. v. United States*, 287 U.S. 12, 24 (1932). The doctrine goes to the heart of Article I, the plain language

of which reposes lawmaking authority solely in Congress. *See* U.S. Const. art. I, § 1.

The Line Item Veto Act fails this test because it authorizes the President to negate the objectives that Congress has identified in its spending and tax legislation. The Act permits the President to "cancel" any dollar amount of any discretionary budget authority, any item of new direct spending, and any limited tax benefit. 2 U.S.C. § 691(a) (Supp. II 1996). By giving the President the power to repeal certain laws, Congress has given away the same Article I legislative power that it hands off when it gives agencies broad power to make the laws. The power to repeal a law, after all, is nothing more than a subset of the larger power to make laws. *See INS v. Chadha*, 462 U.S. 919, 954 & n.18 (1983) ("Amendment and repeal of statutes, no less than enactment, must conform with Art. I. . . . There is no provision allowing Congress to repeal or amend laws by other than legislative means pursuant to Art. I.") There is no question that the Constitution assigns Congress, not the President, the power to enact, and therefore, repeal tax and spending laws. *See* U.S. Const. art. I, §§ 7, 8. Thus, the Act necessarily implicates the nondelegation doctrine.

Because it gives the President the power unilaterally to erase duly enacted law, the Line Item Veto Act veers far from Congress's earlier delegation attempts. The Act is altogether different from the statutes articulating various "public interest" standards that the Court has upheld in earlier cases. *See* Br. for United States at 54-55. In those cases, this Court made explicit that Congress did significantly more than speak in general terms of the public interest, but rather also identified its objectives

and gave some guidance about how to achieve them. *See NBC*, 319 U.S. at 194, 225-26; *New York Cent. Sec.*, 287 U.S. at 25; *Lichter v. United States*, 334 U.S. 742, 778-86 (1948); *Yakus*, 321 U.S. at 420, 426-27; *FPC v. Hope Natural Gas Co.*, 320 U.S. 591, 600 (1944). The Congress and the President presumably were engaged in a joint venture. The Act at issue in this case, however, does not delegate power over the means of achieving a particular end but rather gives the President the power to negate Congress's chosen ends unilaterally. *See* Lawrence Lessig, *Lessons from a Line Item Veto Law*, 47 Case W. Res. L. Rev. 1659, 1662 (1997) (characterizing the Line Item Veto Act as follows: "Congress says, 'Spend $50 million on pork.' The President says, 'Not.' Congress says, 'Give this important interest group a tax break.' The President says, 'Not.' ").

Delegation, if it can be defended at all, can only be defended if it is employed for the purpose of assisting Congress in the administration of its constitutional duty to make the law.[2] By handing the President the power to eliminate the law rather than the power to effect the law, the Line Item Veto Act is a more aggressive attack on the structure of the Constitution than any previous delegation. As Senator Ted Stevens, the lead Senate negotiator in the conference, acknowledged, in filing the Conference Report, the Act is "the most significant delegation of authority by Congress to the President since the Constitution was ratified in 1789." 142 Cong. Rec. S2929-02, at *2955 (March 27, 1996).

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[2] *See infra* Part I.C.

Even if it were constitutional for the President unilaterally to negate the laws made by Congress, the Line Item Veto Act fails this Court's nondelegation doctrine. This Court has held that Congress may delegate legislative lawmaking power only if the delegating statute provides an "intelligible principle" that guides the executive branch to carry out the will of Congress. *See Mistretta*, 488 U.S. at 371-73 (citing *J.W. Hampton, Jr. & Co. v. United States*, 276 U.S. 394, 409 (1928)). The Line Item Veto Act provides no intelligible principle to guide the President. He is empowered to repeal an item if he finds that doing so would

> (i) reduce the Federal budget deficit;
>
> (ii) not impair any essential Government function; and
>
> (iii) not harm the national interest.

2 U.S.C. § 691(a). The first requirement is a tautology and the second and third are all but contentless. These requirements are not "intelligible principles," but rather blatant prescriptions for independent executive branch lawmaking over the spending and taxing powers. The Act gives the President the very sort of uncabined power the Framers feared would lead to arbitrary and capricious rule. *See, e.g.*, James Madison, *Notes of Debates in the Federal Convention of 1787*, at 47, 63, 312 (Ohio U., 1981).

B. The District Court's Reasoning Unnecessarily Complicates This Case

The district court makes the case unnecessarily difficult. It does not apply the "intelligible principle" rule

because it claims that the Act delegates "non-delegable legislative authority" by empowering the President to "make permanent changes to" a law. *City of New York v. Clinton*, 985 F. Supp. 168, 181 (D.D.C. 1998). Apparently, the court below believed that the Act differs from previous delegations because it gives the President the power to alter a law permanently. The permanence of the President's cancellation power, however, is not a distinction that makes a difference under the nondelegation doctrine.

The district court's attempt to distinguish the Line Item Veto Act from agency delegations on the ground that it gives the President a power to change the law permanently is unavailing. The permanence of the executive alteration of the legislature's policy choice should make no difference under Article I. For example, Congress has delegated authority in a way that permits the delegate to make decisions that are permanent or difficult to change. *See, e.g., Field v. Clark*, 143 U.S. 649, 683-92 (1892); *Milk Indus. Found. v. Glickman*, 132 F.3d 1467, 1477-78 (D.C. Cir. 1998). It is not clear that the permanent aspect of the cancellation power under the Act is more troubling than delegations in which agencies can amend their initial determinations. The constitutional evil in the Line Item Veto Act is that the President unilaterally can *negate* a legislative policy determination, not that the President can negate it permanently. The type of harm rendered to the purposes of Article I--to ensure democratic accountability and to protect liberty--is the same whether the President permanently cancels under the Line Item Veto Act, or the President or an appointee promulgates a regulatory law or tax subject to future revision by administrative fiat.

Indeed, the danger to liberty may be even greater when the agency willy-nilly can change its regulatory laws. That is a prime example of arbitrary lawmaking. Thus, the power to make only one change (the power to cancel) may be marginally better than the power to make a series of changes. This is not to argue in favor of the Act by any stretch, but rather to point to the fallacy at the heart of the district court's reasoning that the chief constitutional evil of the Act is the permanency of the President's action. Although the district court reaches the right result, it errs by eschewing this Court's settled nondelegation doctrine in favor of a distinction without a difference.

C. The Federal Government's Defense of the Line Item Veto Act Under This Court's Precedents Is Unpersuasive

The United States vainly tries to pour content into the Act's empty standards by pointing to its provisions instructing the President to consider the legislative history, to provide an estimate of the economic and social effects of a cancellation, and to set forth the geographic distribution of canceled spending. *See* Br. for United States at 57 (citing 2 U.S.C. § 691a(b)). Yet, neither the legislative history nor the information requirements provide *standards* for decision. Instead, they instruct the President to follow a *process* in exercising the lawmaking powers delegated to him. Article I requires Congress at a minimum to state its policy goals. This Act fails even that minimum requirement.

The United States also makes much of various statutes that let the President spend less than the full sums appropriated, apparently on the reasoning that the Line Item Veto Act does nothing more than permit the President to refuse to spend the appropriated funds. *See id.* at 2-7, 51-54. With all due respect, the United States is confusing apples with oranges. The power to spend less than appropriated for the purpose of serving legislatively identified policies is not the same as the power to negate the Congress's policy objective. The former is an Article II executive function. When Congress authorizes the President to spend up to a certain sum for a designated purpose, it has made the legislative policy choice. The Line Item Veto Act lets the President reject Congress's purpose altogether and thus permits the President to undo the legislative policy choice, rather than effect it.

Congress has provided standards for the exercise of its spending authority that are far more substantial than those provided in the Line Item Veto Act. For example, past versions of the Anti-Deficiency Act permitted the President to "provide for contingencies, or to effect savings whenever savings are made possible by or through changes in requirements, greater efficiency of operation, or other developments subsequent to the date on which such appropriation was made available." 31 U.S.C. § 665(c)(2)(1970). Indeed, when Congress concluded that President Nixon had abused the phrase "other developments," it repealed that phrase, making the provision more restrictive.

In light of this Court's existing nondelegation doctrine, a decision in this case to invalidate the Line Item Veto Act can be quite straightforward.

Notwithstanding the utility of this Court's nondelegation doctrine for this case, *amici* believe that the doctrine has validated too many unconstitutional delegations and contributed to the current unacceptable state of affairs, wherein the Congress has become overly comfortable shifting its Article I lawmaking responsibilities to unaccountable agencies. *See infra* Part II.C. The following discussion is offered for the purpose of providing a meaningful context within which to understand the nondelegation doctrine's history, application, and importance.

II. A FRAMEWORK FOR CONSIDERING CONGRESSIONAL DELEGATION AND THE NONDELEGATION DOCTRINE

The nondelegation doctrine is firmly rooted in the Constitution, and this Court long considered it a serious, enforceable requirement. The modern cases have created stark inconsistencies in the case law and rendered the nondelegation doctrine ineffectual at achieving its core purposes of preserving democracy and protecting liberty. There is no good reason to allow this deviance from constitutional principles to continue. Congress, the President, and this Court all bear responsibility to repair current practices. The part that falls to this Court is to explain that the Constitution limits the power of elected lawmakers to shrug their lawmaking responsibility onto unelected officials.

A. The Nondelegation Doctrine Has a Long Pedigree as a Fundamental and Enforceable Part of the Constitution

The Constitution states that "[a]ll legislative Powers herein granted shall be vested in a Congress. . . ." U.S. Const. art. I, § 1. From the earliest days of the Constitution, there is ample evidence demonstrating that both the Framers and this Court believed that representatives should be required to make the hard policy choices. *See Ludecke v. Watkins*, 335 U.S. 160 (1948) (discussing Alien Act of 1789); *Cargo of the Brig Aurora v. United States*, 11 U.S. (7 Cranch) 382, 388-89 (1813); *The Virginia Report of 1799-1800, Touching of the Alien and Sedition Laws, Together with the Virginia Resolutions of December 21, 1798*, at xv, 23 (Leonard W. Levy ed. 1970); Alexis de Tocqueville, *Democracy in America* 57-58 (Phillips Bradley ed. 1946); *see also* David Schoenbrod, *Power Without Responsibility: How Congress Abuses the People Through Delegation* 30-33 (1993) (discussing examples from 18th and 19th centuries). This Court took the nondelegation principle seriously.

The legislative power in Article I is to make rules of private conduct. Chief Justice Marshall made that clear in *Fletcher v. Peck:* "[It] is the peculiar province of the legislature to prescribe general rules for the government of society; the application of those rules to individuals in society would seem to be the duty of other departments." 10 U.S. (6 Cranch) 87, 136 (1810); *see also Loving v. United States*, 116 S. Ct. 1737, 1744 (1996); *Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211, 222 (1995).

According to this understanding of Article I, Congress alone may make rules that govern private persons.

Congress can leave to other branches the interpretation and application of those rules, as well as functions that are not within Article I legislative powers, such as the management of government departments and property. *See* Schoenbrod, *supra*, at 180-191 (discussing the application of this test). Such a standard of unconstitutional delegation is consistent with the purposes of Article I. Branches other than the legislative will face hard decisions in, for example, interpreting statutes and in exercising prosecutorial and remedial discretion. Legislators, however, must face the hard legislative policy choices and take responsibility for their resolution. In stating rules of conduct, the legislature cannot simply promise the best of everything to everyone, but rather must make manifest the costs, as well as the benefits, of its actions. *See generally id.* at 183-84, 186-89.

Before 1890, Congress did not routinely delegate its legislative powers. Around 1890, legislative practice began to change. According to an eminent historian, Professor Robert H. Wiebe, this shift sprang from basic changes in the economy and politics. *See* Robert H. Wiebe, *Self-Rule: A Cultural History of American Democracy* (1995). While power had previously resided principally in the institutions centered on the Main Streets of America, from 1890, nationally oriented institutions, such as nationally oriented businesses, unions, associations, and universities, took on increasing importance. *See id.* at 138-61. These national institutions were run by a new managerial class, trained in what was thought of as scientific methods. *See id.* at 143. Its members believed that scientific managers should not have to account to lay people. *See id.* This class set out to insulate government

from the lower class's influence by various devices, including poll taxes, literacy tests (applied to the lower class of all races), and the delegation of legislative power to expert agencies. *See id.* at 134-37, 164-65, 173-80, 206-07, 217-22.

Because they distinguished expertise from policymaking, many members of this managerial class did not characterize agencies as exercising legislative power. This class was so infatuated with science as the universal solution to policy problems that it seems to have believed that agencies were following instructions rather than making law. For this reason, many zealous supporters of expert agencies could also think of themselves as supporting separation of powers. Thus, from 1890 through the 1920's, as Congress started to delegate, this Court upheld some delegations on the basis that they gave the agencies the power to implement law rather than make it. *See* Schoenbrod, *supra*, at 31-36 (listing cases).

This Court also invalidated some laws for delegating power unconstitutionally. On at least three occasions prior to 1928, this Court struck statutes on delegation grounds. *See Washington v. W.C. Dawson & Co.*, 264 U.S. 219, 227 (1924) (prohibiting Congress from delegating the "power to alter, amend, or revise the maritime law" to states); *United States v. L. Cohen Grocery Co.*, 255 U.S. 81, 87-88, 92-93 (1921) (holding that a vague statute "amounted to a delegation by Congress of legislative power to courts. . . ."); *Knickerbocker Ice Co. v. Stewart*, 253 U.S. 149, 164 (1920) (holding improper delegation of maritime law to the states).

In 1928, this Court upheld a tariff statute under a new test: "If Congress shall lay down by legislative act an intelligible principle to which the person or body authorized to fix such rates is directed to conform, such legislative action is not a forbidden delegation of legislative power." *J.W. Hampton, Jr. & Co. v. United* States, 276 U.S. 394, 409 (1928). The "intelligible principle" in that case provided only limited direction so that the statute, in fact, delegated legislative power. Although a true believer in scientific government, President-elect Herbert Hoover reacted angrily with the following separation of powers analysis:

> The American people will never consent to delegating authority over the tariff to any commission, whether non-partisan or bi-partisan. Our people have a right to express themselves at the ballot upon so vital a question as this.
>
> There is only one commission to which delegation of that authority can be made. That is the great commission of their own choosing, the Congress of the United States and the President. It is the only commission which can be held responsible to the electorate.

With Our Readers, 13 *Const. Rev.* 98, 100 (1929) (quoting President Hoover's speech of Oct. 15, 1928). According to an editorial in the *Constitutional Review*, the statute upheld in *Hampton* "was the most dangerous advance in bureaucratic government ever attempted in America." *Id.* at 101.

Despite the broad and troubling language of *J.W. Hampton*, it was used by this Court to invalidate New Deal laws that evidenced the tremendous increase in the

scope of delegation. Justice Cardozo, concurring in a unanimous decision to strike the National Recovery Act, called it "delegation running riot." *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495, 553 (1935). The constitutional potential in the *J.W. Hampton* rule is emphasized by the 9-0 and 8-1 votes finding Congress's delegation unconstitutional in *Schechter Poultry*, *id.* at 551, and *Panama Refining Co. v. Ryan*, 293 U.S. 388, 433 (1935), respectively.

B. The Supreme Court's Recent Delegation Jurisprudence Is Inconsistent

President Franklin Roosevelt's court-packing plan, and not intellectual persuasion, softened the Court's resolve to invalidate congressional delegations. *See* Henry Julian Abraham, *Justices and Presidents* 198 (1974). While the "intelligible principle" test announced in *J.W. Hampton* has been read appropriately to mean that Congress must state the rules of conduct, *Panama Refining Co.*, 293 U.S. at 421,[3] it has generally come to mean that it is sufficient for Congress to state only its goals even as it ducks the hard policy choices. *See, e.g., Mistretta*, 488 U.S. at 372-73; *United States v. Rock Royal Co-op, Inc.*, 307 U.S. 533, 574 (1939).[4] While this Court has recognized that Congress can recite goals, yet avoid the hard choices, it has not taken the lead in identifying unconstitutional

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[3] *See also Yakus v. United States*, 321 U.S. 414, 424-25 (1944).

[4] This is the weakness in the Court's doctrine that the federal government attempts to exploit to preserve the egregious delegation found in the Line Item Veto Act. *See* Br. for United States at 54-55.

delegations. *See Industrial Union Dep't, AFL-CIO v. American Petroleum Inst.*, 448 U.S. 607, 631-41 (1980); *id.* at 686-88 (Rehnquist, J., dissenting).

Still, the nondelegation doctrine has retained some vitality. Various coalitions of justices have struck particular agency laws on nondelegation principles. For example:

- *Hampton v. Mow Sun Wong*, 426 U.S. 88, 116-17 (1976), struck a statute for delegating to the Civil Service Commission the power to make a law preventing legal aliens from holding civil service jobs. *See id.* at 122 (Rehnquist, J., dissenting).
- *INS v. Chadha*, 462 U.S. 919 (1983), struck hundreds of statutes that delegated to one or two houses of Congress the lawmaking power delegated by the Constitution to the Article I legislative process. *See id.* at 986-87 (White, J., dissenting).
- Void for vagueness cases not only require that the public be given notice of what is forbidden, but deny to executive officials the power to make law. *See, e.g., Smith v. Goguen*, 415 U.S. 566, 572-73 (1974).[5]
- Various cases have struck city ordinances and state or federal statutes delegating overly broad discretion to regulate or punish speech or religion. *See generally* Laurence H. Tribe, *American Constitutional Law* §§ 12-38 (2d ed. 1988).
- Various cases have interpreted statutes to avoid perceived delegation problems, although the net effect is that the courts made the legislative policy decisions not made by Congress. *See, e.g., American Petroleum Inst.*, 448 U.S. at 646; *National Cable Television Ass'n v. United States*, 415 U.S. 336, 340-41 (1974).

[5] The void for vagueness doctrine applies to civil as well as criminal offenses, *see Jordan v. De George*, 341 U.S. 223, 231-32, *reh'g denied*, 341 U.S. 956 (1951), and statutes that delegate to agencies often make violations of agency created laws a criminal offense.

Although this Court has struck agency laws on delegation grounds in many special circumstances, it has generally affirmed delegations in which Congress has not made the hard choices. *See, e.g., Mistretta*, 488 U.S. at 422 (Scalia, J., dissenting); *Rock Royal Co-op*, 307 U.S. 574-76 (upholding statute that delegated authority to make regulations to create "orderly" markets while taking the interest of consumers into account). Thus, the main harm to representative democracy arising from delegation continues.

C. There Is No Good Rationale for Unconstitutional Delegation

A variety of rationales have been advanced to justify delegation, none of which mitigates its constitutional defects. One rationale is that the agencies are experts, and Congress is not. As an empirical matter, however, the hard choices delegated are, at bottom, questions of policy rather than technical questions best resolved by experts. A leading political scientist, Professor Robert Dahl, argues that

> [n]o intellectually defensible claim can be made that policy elites (actual or putative) possess superior moral knowledge or more specifically superior knowledge of what constitutes the public good. Indeed, we have some reason for thinking that specialization, which is the very ground for the influence of policy elites, may itself impair their capacity for moral judgment. Likewise, precisely because the knowledge of the policy elites is specialized, their expert knowledge ordinarily provides too narrow a base for the instrumental judgments that an intelligent policy would require.

Robert Dahl, *Democracy and Its Critics* 337 (1989). Congress need not delegate to take advantage of expertise. It can call on its own technical experts as well as experts in agencies. Moreover, the legislative branch is best suited for broad-ranging factfinding. *See City of Boerne v. Flores*, 117 S. Ct. 2157, 2172 (1997); *Turner Broad. Sys., Inc. v. FCC*, 117 S. Ct. 1174, 1191 (1997).

A second common rationale for delegation is that it is a necessity of modern government because of the volume of work. This rationale is circular. By skewing legislators' political incentives, failure to enforce the nondelegation doctrine encourages Congress to send more and more issues through the federal bureaucracy.

Although the inflation of the regulatory state does not justify delegation, it must be faced in considering whether it can be ended. The question is best left to Congress. One sensible approach among others that Congress could take is described in an article by Justice Breyer in which he suggested that Congress could respond to the decision in *INS v. Chadha*, 462 U.S. 919

(1983), by enacting a statute requiring that agency regulations be enacted through the legislative process rather than promulgated as agency rules. Stephen G. Breyer, *The Legislative Veto After Chadha*, 72 Geo. L. J. 785 (1984). He offered many variations on this approach, such as an expedited legislative process, *id.* at 793-94, which would take less time than judicial review of agency regulations. Justice Breyer's ideas have prompted bills by Congressman J. D. Hayworth and Senator Sam Brownback. H.R. 1036, 105th Cong. (1997); S. 433, 105th Cong. (1997).[6] Another approach would be for Congress to take responsibility for at least the major rules. *See, e.g.*, Congressman Nick Smith, *Restoration of Congressional Authority and Responsibility over the Regulatory Process*, 33 Harv. J. Legis. 323 (1996); Paul R. Verkuil, Comment, *Rulemaking Ossification: A Modest Proposal*, 47 Admin. L. Rev. 453, 457-59 (1995).

A third rationale for refusing to enforce the nondelegation doctrine is the argument that courts lack a judicially manageable test. The Court's current test, requiring an "intelligible principle," provides no bright line, but it is no less manageable than most constitutional standards. As Professor Louis Jaffe, a prominent defender of delegation wrote of the "intelligible principle" test, "nearly every doctrine of constitutional limitation has been attacked as vague. Essentially the charges go to the institution of judicial review as we have it rather than specifically to the delegation doctrine." Louis L. Jaffe, *An*

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[6] So far, the bills have 68 sponsors in the House and 13 in the Senate.

Essay on Delegation of Legislative Power (Part II), 47 Colum. L. Rev. 561, 577 (1947).

There are two powerful reasons for believing that taking the "intelligible principle" test seriously would actually reduce the Court's involvement in legislative policy choices. First, the truth is that this Court has enforced the non-delegation doctrine selectively and inconsistently. Justices with diverse viewpoints have often expressed concern that the Court's nondelegation doctrine is contradictory. *See, e.g., Smith*, 415 U.S. at 591-604 (Rehnquist, J., dissenting); *Hampton*, 426 U.S. at 112 (Rehnquist, J., dissenting); *American Petroleum Inst.*, 448 U.S. at 717-18 n.30 (Marshall, J., dissenting); *National Cable Television Ass'n*, 415 U.S. at 352-54 (Marshall, J., dissenting); *Chadha*, 462 U.S. at 986-87 (White, J., dissenting); *see also* Schoenbrod, *supra*, at 40-45, 181. This case offers the Court the opportunity to place its nondelegation doctrine on a more internally consistent and less political plane.

Second, as Justice Scalia wrote:

> the argument may be made that in modern circumstances the unconstitutional delegation doctrine, far from permitting an increase in judicial power, actually reduces it. For now that judicial review of agency action is virtually routine, it is the courts, rather than the agencies that can ultimately determine the content of standardless legislation.

Antonin Scalia, *A Note on* the Benzene Case, 4 Reg. 25, 28 (July-Aug. 1980); *see also* Carl McGowan, *Congress, Court, and Control of Delegated Power*, 77 Colum. L. Rev. 1119, 1120 (1977).[7] Content review rather than nondelegation review puts the courts directly in the center of controversial policy decisions because it falls to the courts to review the hard policy choices made by agencies.[8] By enforcing the nondelegation doctrine and asking only the question of *whether* Congress made the law (rather than the question regarding the quality of the law), this Court would in fact reduce its involvement in matters properly left to the legislative process.

Although the Court can dispose of this case under the current "intelligible principle" test, we believe that it is not the best test of unconstitutional delegation. *See* Schoenbrod, *supra*, at 157-58, 180-81. The Court would better serve the fundamental purposes of the nondelegation doctrine--to preserve democracy and protect liberty--if it went back to the original concept of legislative rule.

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[7] Judicial deference to agency lawmaking reduces judicial policy making, but only at the price of making even more fictional the notion that the agency is directed by statute.

[8] *See, e.g., Coyne Bheam, Inc. v. FDA*, 966 F. Supp. 1374 (M.D.N.C. 1997) (discussing White House proposals for the Food and Drug Administration to regulate tobacco); *Clinton Looks Elsewhere on Finance Reform*, N.Y. Times, Feb. 28, 1998, at A7 (recounting how President Clinton had sent the Federal Election Commission and the Federal Communications Commission messages asking the former "to end the use of soft money, and asking the [latter] to do more to provide air time free or at lower cost to candidates" after campaign finance reforms were defeated in the Senate); Editorial, *New Phone Tax*, Wall. St. J., Dec. 9, 1997, at A22 (describing how the Federal Communications Commission is ultimately passing onto consumers a hidden tax in order to finance the vague mandate in the 1996 telecommunications bill to give every school and library access to the Internet).

The Framers and the early Supreme Court thought it was Congress's job to make the law. In the Court's view, the legislature was to make the rules of conduct, not just state the policy goals. *See supra* Part II.A. The present case does not require the Court to decide whether to improve upon the "intelligible principle" test because the Line Item Veto Act is clearly unconstitutional under either the Court's original test or its now existing test, but it does give this Court an opportunity. The Court need not fear that it is acting alone. Unlike in the days of the Court packing plan, Congress is now looking for ways in which it can once again assume its constitutional responsibility to make the hard choices. Congress has stepped forward to begin grappling with the delegation problem with recently enacted legislation, *see* 5 U.S.C. §§ 801-08 (Supp. 1997) (expediting congressional review of agency rules), as well as the pending legislative proposals previously discussed.

D. The Court, Congress, and the President Share Equal Responsibility To Hold the Line on Delegation

The burden of upholding the Constitution is not the Court's alone. *See Boerne*, 117 S. Ct. at 2172. The Congress has a constitutional obligation as strong as the Court's to keep delegation in line. As Justice Kennedy, joined by Justice O'Connor, stated in his concurring opinion in the decision in *United States v. Lopez*,

> it would be mistaken and mischievous for the political branches to forget that the sworn obligation to preserve and protect the Constitution in maintaining the federal balance is their own in the first and primary instance. . . . The political branches of the Government must fulfill this grave constitutional obligation if democratic liberty and the federalism that secures it are to endure.
>
> At the same time, the absence of structural mechanisms to require those officials to undertake this principled task, and the momentary political convenience often attendant upon their failure to do so, argue against a complete renunciation of the judicial role.

514 U.S. 549, 577-78 (1995). On the Court's side, this Court's decisions in *Lopez*, *Boerne*, *Printz v. United States*, 117 S. Ct. 2365 (1997), and in particular its discussion of delegation in *Loving*, signal that the Court is now embracing its constitutional duty to provide meaningful boundaries to the limited powers accorded Congress by the Constitution. This readiness to treat the separation of powers with some seriousness is the surest path to liberty. *See Boerne*, 117 S. Ct. at 2168, 2172.

In principle, this Court has always agreed that Article I limits the power of Congress to delegate its responsibility to make the law. *See Loving*, 116 S. Ct. at 1744; *Mistretta*, 488 U.S. at 371-72; *Schechter Poultry*, 295 U.S. at 529-30; *Panama Refining Co.*, 293 U.S. at 421; *Field*, 143 U.S. at 692; *see also* Marci A. Hamilton, *Discussion and Decisions: A Proposal to Replace the Myth of Self-Rule with an Attorneyship Model of Representation*, 69 N.Y.U. L. Rev. 477, 544-54 (1994) (discussing independent decision-making responsibility of legislators). The people, no less than Congress, have a right to hear the Court explain how the Constitution requires Congress and the President to be accountable by taking responsibility for the laws that

government imposes on the public. This Court should continue its commitment to this core structural constitutional requirement by applying, clarifying, and buttressing the nondelegation doctrine in this case to invalidate the Line Item Veto Act.

CONCLUSION

Article I of the Constitution prevents Congress from abdicating its responsibility to make the hard policy choices. If the Court fails to invalidate those laws in which Congress abdicates its central constitutional role, this Court will have deprived the people, the States, and the Congress of the guidance necessary to bring legislative practices within the constitutional fold. Accordingly, *amici curiae* urge this Court to hold that the Line Item Veto Act is an unconstitutional transfer of lawmaking authority from the Congress to the President.

Respectfully submitted,

MARCI A. HAMILTON
DAVID SCHOENBROD

*MARCI A. HAMILTON
Benjamin N. Cardozo School of Law
55 Fifth Avenue
New York, New York 10003
(212) 790-0215
(212) 790-0205 (facsimile)

DAVID SCHOENBROD
New York Law School
57 Worth Street
New York, New York 10013
(212) 431-2339
(212) 431-9205 (facsimile)

**Counsel of Record*

(13)

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In The

Supreme Court of the United States

October Term, 1997

WILLIAM J. CLINTON, ET AL.,

Appellants,

v.

CITY OF NEW YORK, ET AL.

ROBERT E. RUBIN,

Appellant,

v.

SNAKE RIVER POTATO GROWERS, INC., ET AL.

On Appeal From The United States District Court For The District Of Columbia

BRIEF AMICUS CURIAE OF JOHN S. BAKER JR. IN SUPPORT OF THE APPELLANTS, WILLIAM J. CLINTON, ET AL.

JOHN S. BAKER, JR.
Counsel of Record
Rm. 414
LSU Law Center
Baton Rouge, Louisiana 70803
(504) 388-8846

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

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QUESTION PRESENTED

The Line Item Veto Act, 2 U.S.C. § 691 et seq. (Supp. II 1996), gives the President conditional authority to cancel certain spending and revenue items within five days after a bill containing such items has been enacted into law.

The question presented is:

Whether the Act violates Article I of the Constitution or principles of separation of powers.

PARTIES TO THE PROCEEDINGS

The appellants here, who were the defendants in the district court, are William J. Clinton, the President of the United States; Donna E. Shalala, the Secretary of Health and Human Services; Franklin D. Raines, the Director of the Office of Management and Budget; and Robert E. Rubin, the Secretary of the Treasury. The appellees here, who were the plaintiffs below, are the City of New York; the New York City Health and Hospitals Corporation; the Greater New York Hospital Association; the Jamaica Hospital Medical Center; District Council 37, American Federation of State, County, and Municipal Employees; Local 1199, National Health and Human Service Employees Union; Snake River Potato Growers, Inc.; and Mike Cranney.

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OPINION BELOW[1]

The opinion of the district court is available at 985 F. Supp. 168; 1998 U.S. Dist. LEXIS 1295.

SUMMARY OF ARGUMENT

The Line Item Veto Act does not violate the principle of separation of powers. The district court's conclusion to the contrary reflects a misunderstanding of how the principle of separation of powers was actually implemented in the Constitution. As a result of this mistaken premise, the district court mis-characterizes the Act as an improper ceding of legislative authority to the Executive Branch.

As explained in *The Federalist Papers*, the President has a qualified "negative" on legislation, i.e., veto, primarily for the purpose of self-defense against the encroachments of Congress. While the district court describes this Act as an intrusion into the Congress' law-making power, the Act actually responds to a relatively recent practice by which Congress bundles disparate pieces of legislation into a "bill." Through this practice,

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[1] The parties have conserted to the filing of this brief. As required by Rule 37.6 of the United States Supreme Court, the following disclosure is made: This brief was authored for the amicus by John S. Baker Jr. No other persons authored this brief. No person or organization made a monetary contribution to the preparation and submission of this brief.

Congress has made it practically impossible for the President to exercise his constitutional responsibility to exercise an independent judgment about legislation presented to him. The Act meets the formal requirements specified in the Constitution for the President's handling of legislation, as explained in the Government's brief; moreover, it conforms to the plan of separation of powers found in the Constitution.

Article I, Section 8, Clause 1 of the Constitution provides that Congress' spending power is limited to the "general" – as opposed to "local" – welfare. At least some of Congress' spending appears to be in violation of this provision. Nevertheless, such limitations are generally not susceptible to judicial enforcement. Under the scheme created by the Constitution, it falls to the President to limit Congress to spending for the "general" welfare. The Line Item Veto Act, in accordance with the Constitution and the principle of separation of powers, enables the President to prevent at least some spending which affects only "local" welfare.

ARGUMENT

THE LINE ITEM VETO ACT IS CONSISTENT WITH THE SEPARATION OF POWERS

The argument of Amicus is limited to supplementing Part II B. (pages 36-41) of the Government's brief. More specifically, the argument elaborates on why the Line Item Veto Act does not violate the principle of separation of powers; indeed, it reinforces that principle.

A. THE DISTRICT COURT MIS-CHARACTERIZED THE LINE ITEM VETO ACT

The government writes that "the constitutional analysis in this case should turn on the *substance* of the powers vested in the President by the Line Item Veto Act," quoting this Court's statement that "separation-of-powers analysis does not turn on the labeling of an activity." Gov't Br. at 41, *Metropolitan Washington Airports Authority v. Citizens for the Abatement of Aircraft Noise*, 501 U.S. 252, 267 (1991), quoting *Mistretta v. United States*, 488 U.S. 361, 393 (1988). The problem, as *Mistretta* went on to say, is that "[G]overnmental power cannot always be characterized with only one . . . labe[l]," quoting from a concurring opinion in *Bowsher v. Synar*, 478 U.S. 714, 749 (1986).

At the end of whatever process of analysis has been used to identify the substance of the activity, separation-of-powers cases generally do involve choosing among competing characterizations of the governmental activity at issue. Thus, *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952) characterizes the President's Executive Order to seize the steel mills as law-making; not execution of the laws, as the President contended. Those in the Court's majority may sometimes characterize an activity quite differently. Thus in *INS v. Chadha*, 462 U.S. 919 (1983), the opinion for the Court characterizes as legislative the House of Representatives' resolution that Chadha's deportation order "should not be suspended," making the action subject to the presentment and bicameralism requirements. Although agreeing that the House action violated separation of powers, the concurring

opinion of Justice Powell characterizes the same action as "judicial." On at least one occasion, the Court has recognized that a congressional act could be properly characterized in either of two ways, both of which violated separation of powers. In striking down a congressionally created Board of Review, consisting of members of Congress, *Metropolitan Washington Airports Authority v. Citizens for Abatement of Aircraft Noise, Inc.*, 501 U.S. 252, 276 (1991) stated: "If the power [of the Board] is executive, the Constitution does not permit an agent of Congress to exercise it. If the power is legislative, Congress must exercise it in conformity with the bicameralism and presentment requirements."

The lower court characterizes the Line Item Veto Act as law-making by the President. (It "ced[es] inherently legislative authority to the President" 985 F. Supp. 168 (1998), Lexis 1295, 44. This characterization concludes a discussion of separation of powers which begins with the statement that the "Act is unconstitutional because it impermissibly disrupts the balance of powers among the three branches of the government," *id.* at 38 and proceeds to find an impermissible delegation of legislative power. To the extent that the anti-delegation argument of the lower court requires refutation, the Government does so in Part II C. (pp. 41-49). The Government brief might have done more, however, to address the lower court's claim about the balance of power.

1. The lower court's characterization of the Line Item Veto Act seems to proceed from its understanding of separation-of-powers principles. While the lower court opinion cites *The Federalist Papers*, your Amicus submits that the opinion misconceives the relationship between

the President and Congress as created by the Constitution and explained in *The Federalist*. Without rehearsing the basics of the separation-of-powers doctrine presented in *The Federalist* and addressed at length in this Court's separation-of-powers cases since *Chadha*, a few points deserve attention.

A constitutional system based on separation of powers does not naturally tend toward equilibrium. The threat to balance in the government of the United States, according to Madison in *Federalist 51*, comes primarily from the legislative branch.

> In republican government the legislative authority, necessarily, predominates. . . . As the weight of the legislative authority requires that it should be thus divided, the weakness of the executive may require, on the other hand, that it should be fortified.

Federalist No. 51, p. 350 (J. Cooke ed., 1961).

The balance created in the Constitution was achieved largely by fortifying the President with the veto (and the Judiciary with judicial review). The primary purpose of the President's veto power, according to the Framers, was not to produce better legislation – that was only secondary. The primary purpose was to provide the President with a weapon of self-defense.

> The primary inducement to conferring the power [to veto legislation] upon the executive, *is to enable him to defend himself*; the secondary one is to increase the chances in favor of the community, against passing of bad laws, through haste, inadvertence, or design.

Federalist No. 73, p. 495.

If one thinks that the veto is only, or principally, about law-making, then – like the lower court – the tendency would be to view the veto very narrowly. Indeed, *The Federalist* has to defend the Constitution against the Antifederalist charge that the Constitution violates separation of powers due to various checks of one branch on the other, see *Federalist* No. 47, and that the President's "negative" improperly interferes with law-making. See *Federalist* No. 73. If, on the other hand, one thinks that the veto is principally about self-defense for the Executive, then in characterizing the Line Item Veto Act, one would give great weight to Madison's warning that the legislative power "can with the greater facility, mask under complicated and indirect measures, the encroachments which it makes on the coordinate departments." *Federalist* No. 48, p. 334.

2. So what encroachment by the Congress against the President has occurred for which the Line Item Veto Act might provide self-defense? Is not the danger, rather, that potentially the Executive Branch will over-reach Congress – even if that might not have seemed likely two hundred years ago? One could cite *Youngstown* and argue that with the advent of the administrative state and the nationalization brought about by two world wars that the Executive has become a greater danger than anticipated by the Framers. *Youngstown*, however, is the exception that proves the rule. *Youngstown* involves an initiative by the President justified by joining his (domestic) executive powers and his Commander-in-Chief powers and a claim about implied powers. The one presidential initiative since *Youngstown* on the domestic front based on a claim of implied powers and not sanctioned by Congress

involves President Nixon's efforts to impound funds voted by the Congress. See Government Br. at 5. Is it surprising that that effort was short-lived as Congress enacted the Impoundment Control Act of 1974 (ICA), Pub. L. No. 93-344, Tit. X, 88 Stat. 332 (codified as amended at 2 U.S.C. §§ 681 *et seq.*)?

The ICA was amended in 1996 by the Line Item Veto Act. See Pub. L. No. 104-130, 110 Stat. 1200 (J.S. App. 36a-60a) (codified at 2 U.S.C. §§ 691 *et seq.* (Supp. II 1996)). Could it be that legislation originally enacted to block the Executive's refusal to carry out the will of Congress is now, as the lower court put it, "ceding inherently legislative authority to the President?" 985 F. Supp. 168 (1998), Lexis 1295, 44. The change in parties controlling the Congress and the Presidency may account for the passage of legislation. A change in parties and policy, however, does not mean that Congress as an institution will act fundamentally in a manner different from what was described in *The Federalist*.

Rather than "ceding" legislative power, the Congress continues to demonstrate its willingness to expand its legislative powers, albeit in different areas such as crime control. See, e.g., *United States v. Lopez*, 514 U.S. 549 (1995). Expanding power comes much more easily than shedding it – much like weight gain. The anti-crime policies of the majority of this Congress, therefore, are more easily implemented than its attempts at budget control. On spending matters, Congress has tried the Balanced Budget and Emergency Deficit Control Act of 1985, a key provision of which was invalidated in *Bowsher v. Synar*, 478 U.S. 714 (1986). As a result of *Bowsher*, it is clear that

Congress itself cannot exercise executive control to discipline spending.

In judging whether Congress has encroached on the Executive, it is well to remember that "[i]t is not unfrequently [sic] a question of real nicety in legislative bodies, whether the operation of a particular measure, will, or will not extend the legislative sphere." *Federalist* No. 48 at 334. The encroachment by Congress to which the Line Item Veto Act responds is noted, but not developed, in the Government's brief. "In recent years, Presidents have regularly been compelled to make all-or-nothing decisions to accept or reject large combinations of multifarious spending items." Gov't Br. at 35. This results from "the recent congressional practice of (1) routinely combining numerous and diverse spending items in a single bill, and (2) sharply restricting the President's authority to decline to spend appropriated funds." *Id.* Congress has in practice, therefore, succeeded in evading, through indirection, what Madison attempted to prevent with his addition to the presentment requirement.

As noted in the Government's brief at 33, n. 17, Madison feared that Congress could avoid the requirement of presentment of "Bill[s]," Article I, Section 7, Clause 2, "by the simple expedient of calling a proposed law a 'resolution' or 'vote' rather than a 'bill.' " *INS v. Chadha*, 462 U.S. 919, 947 (1983). Thus Clause 3 was added which requires presentment of "Every Order, Resolution, or Vote to which the Concurrence of the Senate and House of Representatives may be necessary (except on a question of Adjournment)." So Congress honors the form, but not the substance, of the provision by "presenting"

such a bundle that the President cannot possibly give such "bills" his considered approval.

In effect, although not formally, the Line Item Veto Act allows the President partially to un-bundle what the Framers would not have considered a proper "bill." The Government brief does not make that argument, instead emphasizing that the "Act Is Consistent With The Constitutional Requirement That The President 'Sign' Or 'Return' A Presented Bill *In Toto*." Br. at 33, II A. Whether or not this Court agrees with the Government's characterization of the Act as "remaining faithful to the procedural requirements of Article I," *id.*, should turn on whether the formalities of the Act conform in substance to the Constitution's separation-of-powers principles. The lower court's rejection of the Government's position appears to have been based on its (mis)conception of separation-of-powers principles. Amicus urges that the Act is consistent not only as a technical matter of form with the Constitution, which is what the Government emphasizes, but that the formal consistency also comports with the Constitution's principles of separation of powers.

B. THE PRESIDENT'S VETO POWER IS THE PRINCIPAL CHECK ON UNCONSTITUTIONAL SPENDING BY CONGRESS

Although "[t]he national spending power is probably the most important of all Art. I, Sec. 8, powers in its impact on the actual functioning of the federal system," Gunther and Sullivan, *Constitutional Law* (Westbury, Foundation Press, 1997), congressionally approved spending which might violate the Constitution almost

always escapes judicial review. As a general rule, taxpayer status does not confer the standing necessary to challenge spending legislation. *Frothingham v. Mellon*, 262 U.S. 447 (1923). Moreover, while taxpayers generally do not have access to the courts to challenge the constitutionality of government spending, those claiming benefits under a statute do have access to court to challenge the denial of those benefits on statutory and/or constitutional grounds. The result is an unintended bias in favor of more spending.

The spending power of Congress is not without constitutional limits, as Justice O'Connor observed in *South Dakota v. Dole*, 483 U.S. 203, 212, dissenting opinion (1987). Those limits are articulated in one of the few cases in which a taxpayer had standing due to the designation of the taxes for a particular spending program: *United States v. Butler*, 297 U.S. 1 (1936). "While Butler's authority is questionable insofar as it assumes Congress has no regulatory power over farm production, *its discussion of the spending power and its description of both the power's breadth and its limitations remain sound.*" *Id.* at 216-17 (emphasis added), O'Connor, J., dissenting.

Butler endorsed a broad view of the ability of Congress to spend pursuant to Article I, Section 8, Clause 1 which provides Congress the "Power To lay and collect Taxes, . . . to pay Debts and provide for the common Defence and *general* Welfare . . . " (emphasis added). Nevertheless, even under that view the clause contains limits which cast doubt on the constitutional validity of certain categories of "pork-barrel" spending. *Butler* observed that "[s]ince the foundation of the nation sharp

differences of opinion have persisted as to the true interpretation" of the spending provision. After describing Madison's narrower view and the broader Hamilton-Story view, the Court "conclude[d] that the reading advocated by Mr. Justice Story is the correct one." 297 U.S. at 66.

The Court then quoted from Justice Story's explanation of the limits on Congress' power to spend for the general welfare, as follows:

> "The Constitution was, from its very origin, contemplated to be the frame of a national government, of special and enumerated powers, and not of general and unlimited powers."

Again he says:

> "A power to lay taxes for the common defense and general welfare of the United States is not in common sense a general power. It is limited to those objects. It cannot constitutionally transcend them."

> *Id.*, quoting from Story, *Commentaries on Constitution of United States*, 5th ed. vol. I., Secs. 909 and 922.

Butler also noted that Story "makes it clear that the powers of taxation and appropriation extend only to matters of national, *as distinguished from local, welfare.*" *Id.* at 67. (emphasis added).

Amicus is not suggesting that this Court should start striking down spending legislation; quite the contrary. Even if taxpayers could establish the necessary standing, it is very doubtful that this Court could develop judicially

enforceable standards applicable to congressional spending generally (as opposed to the issues of conditional-spending). The "local-general" distinction suggested by Justice Story would seem to be as unworkable as the "local-national" distinction proved to be as applied to the Commerce Clause, beginning with *Cooley v. Board of Wardens*, 12 How. (53 U.S.) 299 (1851).

If constitutional restraints are ever again to be imposed on Congress' spending appetite, as a practical and a separation-of-powers matter, only the Executive can do so. That is not to suggest that the Executive should intrude into the prerogatives of this Court. Rather, as President Madison stated in vetoing an internal improvements spending bill for constitutional reasons, "questions relating to the general welfare, being questions of policy and expediency, are unsusceptible of judicial cognizance and decision." *Messages and Papers of the Presidents, II*, 570.

The President has a national constituency; members of Congress have a local or state constituency. On spending matters, members of Congress cannot be expected to act always for the "general" welfare. As shaped by the Constitution, including the veto power, the Presidency has the competence and the motives to act for the "general" welfare. The Line Item Veto Act allows for the possibility that the President will veto spending for "local" welfare and thus bring federal spending more in line with the Constitution.

CONCLUSION

The judgment of the district court should be reversed.

Respectfully submitted,

JOHN S. BAKER, JR.*
Counsel of Record
Rm. 414
LSU Law Center
Baton Rouge, Louisiana 70803
(504) 388-8846

April 2, 1998

* Counsel gratefully acknowledges the assistance of Mr. Travis N. Bolin.

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In The

Supreme Court of the United States

October Term, 1997

WILLIAM J. CLINTON, ET AL.,

Appellants,

v.

CITY OF NEW YORK, ET AL.

ROBERT E. RUBIN,

Appellant,

v.

SNAKE RIVER POTATO GROWERS, INC., ET AL.

On Appeal From The United States District Court
For The District Of Columbia

MOTION OF JOHN S. BAKER, JR. TO FILE OUT OF TIME A BRIEF *AMICUS CURIAE* IN SUPPORT OF THE APPELLANTS, WILLIAM J. CLINTON, ET AL.

JOHN S. BAKER, JR.
Counsel of Record
Rm. 414
LSU Law Center
Baton Rouge, Louisiana 70803
(504) 388-8846

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MOTION FOR LEAVE TO FILE OUT OF TIME A BRIEF *AMICUS CURIAE* IN SUPPORT OF THE UNITED STATES

Now comes John S. Baker, Jr. who respectfully moves this Court for permission to file out of time a brief *amicus curiae* in support of the appellant, the United States Government. Attorneys for the parties have given their written consent to filing the brief itself.

As a result of conversations between my office and the office of the Clerk of the Court, I had the understanding that an *amicus brief* in support of the appellant could be filed until Friday, April 3, 1998. After the brief and consent letters were filed, the Documents Control section informed me that the Clerk's Office could not in fact grant an extension because in this case the briefing schedule had been set by the Court itself.

The tendered *amicus* brief does not cover the same arguments made in the Government's brief. It is submitted with the hope that it will be of some small assistance to the Court.

Respectfully submitted,

JOHN S. BAKER, JR.
Counsel of Record
Rm. 414
LSU Law Center
Baton Rouge, Louisiana 70803
(504) 388-8846